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IN THE

Supreme Court of the United States

CRAIG MATTHEW FREDERICKSON,
Petitioner,

v.

DAVID D. COOP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

O.C. "Rusty" Sparks
Clark, Byarlay & Sparks
620 W. Third Street
Suite 100
Little Rock, AR 722201

Jonathan L. Marcus
Counsel of Record
Robert A. Long, Jr.
Michael St. Patrick Baxter
Theodore P. Metzler, Jr.
Covington & Burling LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000

January 2009 *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Under Section 1325(b)(1)(B) of the Bankruptcy Code, 11 U.S.C. § 1325(b)(1)(B), a Chapter 13 bankruptcy plan cannot be confirmed over the trustee's objection unless "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan."

The Question Presented is:

Whether the Eighth Circuit correctly held that, in determining a Chapter 13 debtor's "projected disposable income" under 11 U.S.C. § 1325(b), the debtor's "disposable income" as defined in that section is merely a "starting point" for determining "projected disposable income" and may be replaced with an entirely different calculation of disposable income in the bankruptcy court's discretion.

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PETITION FOR A WRIT OF CERTIORARI

This petition presents the Court with an opportunity to resolve a circuit conflict on a question of fundamental importance to the administration of Chapter 13 cases under the Bankruptcy Code. The conflict arises from the statutory definition of a debtor's "disposable income" enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 ("BAPCPA"). In this case, the Eighth Circuit held, in accord with the Tenth Circuit but contrary to the Ninth Circuit, that a bankruptcy court is not required to project the debtor's "disposable income" as defined by the statute, 11 U.S.C. § 1325(b)(2), to determine the amount of payments that must be made to unsecured creditors. Instead, under the Eighth Circuit's (and Tenth Circuit's) approach, the bankruptcy court may disregard a debtor's statutory "disposable income" under BAPCPA, and use the pre-BAPCPA method of calculating disposable income to find "projected disposable income."

As a result of the circuit conflict, the amount a Chapter 13 debtor must pay unsecured creditors to obtain confirmation of a bankruptcy plan when the trustee or the holder of an unsecured claim objects turns on the happenstance of the debtor's state of residence. If petitioner had resided in the Ninth Circuit, his plan—which offered to pay unsecured creditors far more than required under BAPCPA's definition of "disposable income"—would have been confirmed over the trustee's objection rather than rejected as insufficient by the Eighth Circuit.

This Court should grant review to restore the uniformity in bankruptcy law that the Constitution requires and that Congress intended by enacting a definition of "disposable income" to replace discretionary calculations that prevailed pre-BAPCPA. Because the calculation of income available to pay unsecured creditors is a core function of the bankruptcy court in Chapter 13 cases, the question presented is recurring, dividing not only the federal courts of appeals but numerous bankruptcy appellate panels and bankruptcy courts as well. The issue is also critically important, especially as bankruptcy filings have steeply increased with the deteriorating economy.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-17a, is reported at 539 F.3d 237. The decision of the bankruptcy appellate panel, App., *infra*, 18a-38a, is reported at 375 B.R. 829. The order of the bankruptcy court, App., *infra*, 39a-55a, is reported at 368 B.R. 825.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2008. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1325(b) of the Bankruptcy Code, Title 11, United States Code, provides, in relevant part:

> (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court

may not approve the plan unless, as of the effective date of the plan—

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The relevant provisions of Sections 101 and 707 and the other relevant provisions of Section 1325 of Title 11 are reprinted in the Appendix, *infra*, 55a-66a.

STATEMENT OF THE CASE

1. *The Statutory Scheme.* Individuals seeking bankruptcy relief generally seek a liquidation under Chapter 7 of the Bankruptcy Code or a plan for repayment of their debt under Chapter 13. Chapter 13 permits an individual debtor with a source of regular income to be released from certain debts after completing a bankruptcy plan that meets the Code's specifications, including an agreement to pay at least some of his or her debts. The bankruptcy court "shall confirm" a plan that meets the Code's requirements.[1] 11 U.S.C. § 1325(a).

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[1] In order to be confirmed, the Code requires that: (a) the plan must comply with the Bankruptcy Code; (b) all fees and charges must be paid; (c) the bankruptcy petition must have been filed and the plan must be proposed in good faith; (d) the plan must be as favorable to unsecured creditors as if there had been a liquidation under Chapter 7 of the Bankruptcy Code; (e) the (...continued)

The plan must satisfy additional requirements if the trustee or an unsecured creditor objects to the plan. 11 U.S.C. § 1325(b)(1). Those requirements include that "all the debtor's *projected disposable income* to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). This case concerns a conflict among the federal courts of appeals over the post-BAPCPA interpretation of "projected disposable income" in this requirement. The conflict arises because some courts are importing pre-BAPCPA practice, disregarding BAPCPA's changes to the calculation of "projected disposable income."

a. "*Disposable Income*" and "*Projected Disposable Income.*" Before BAPCPA, bankruptcy courts determined a Chapter 13 debtor's "disposable income" by comparing the debtor's monthly income (reported on Schedule I) against his or her monthly expenses (reported on Schedule J). *See* 11 U.S.C. § 521(a)(1)(B)(ii) (debtor "shall file" a "schedule of current income and current expenditures"). Because the statute permitted the deduction from income of only those expenses deemed "reasonably necessary," 11 U.S.C. § 1325(b)(2) (2000), bankruptcy courts exercised broad discretion in determining the amount of "disposable income" available to pay

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plan must comply with specific restrictions on the discharge of secured debt; (f) the debtor must be able to make the payments under the plan; (g) the debtor must be current on any domestic support obligations; and (h) the debtor must have filed all federal, state, and local tax returns. 11 U.S.C. § 1325(a).

creditors under Section 1325(b)(1)(B).[2] Once the court settled on a disposable income figure, it would multiply that figure by the number of months in the plan (pre-BAPCPA the debtor had to make payments for 36 months) to ascertain the debtor's "projected disposable income" to be applied to make payments to creditors over the life of the plan. *See, e.g. Anderson* v. *Satterlee*, 21 F.3d 355, 357-58 (9th Cir. 1994).

Congress changed the definition of "disposable income" in 2005. Section 1325 of the Code now defines "disposable income" "[f]or the purposes of [subsection (b)(1)(B)]" as the debtor's "current monthly income" less "amounts reasonably necessary to be expended" for purposes specified by the Code. 11 U.S.C. § 1325(b)(2). Thus, after BAPCPA, the first step in calculating "disposable income" for the purposes of Section 1325(b) is to determine the debtor's "current monthly income." "[C]urrent monthly income" is defined by the Bankruptcy Code as "the average monthly income from all sources" that the debtor received in the six calendar months prior to filing the bankruptcy petition. 11 U.S.C. § 101(10A).[3] Congress has chosen to exclude certain

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[2] Before BAPCPA, Section 1325(b) defined "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended" for supporting the debtor or the debtor's dependents, qualifying charitable contributions, or continued operation of the debtor's business. 11 U.S.C. § 1325(b)(2) (A), (B) (2000).

[3] If the debtor does not file a schedule of current income with the petition, the six-month period is the six calendar months prior to the date that the court determines the debtor's current income. 11 U.S.C. § 101(10A)(ii).

forms of income from the statutory definition, including social security benefits. 11 U.S.C. § 101(10B). Under Federal Rule of Bankruptcy Procedure 1007(b)(6), all Chapter 13 debtors must file a statement of "current monthly income," prepared on Form 22C.[4] Fed. R. Bankr. P. 1007(b)(6).

The second step in calculating "disposable income" is to determine the "amounts reasonably necessary to be expended" for expenditures specified by the Code. 11 U.S.C. § 1325(b)(2). For debtors whose income is above the median income in the debtor's state for the debtor's household size (known as "above-median debtors"), the "amounts reasonably necessary to be expended" are now determined "in accordance with subparagraphs (A) and (B) of [S]ection 707(b)(2)." 11 U.S.C. § 1325(b)(3). Section 707(b)(2), in turn, specifies that certain of the debtor's expenses "shall be" the amounts set in National and Local Standards "issued by the Internal Revenue Service for the area in which the

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[4] This form, formerly known as "Form B22C," is titled "Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income." Debtors must also list "current income and expenditures," which are reported on Schedules I and J, respectively. Fed. R. Bankr. P. 1007(b)(1)(B); *see* 11 U.S.C. § 521(a)(1)(B)(ii). Schedule I directs the debtor to report "average or projected income" at the time the petition is filed. Accordingly, a debtor's Schedule I income may be different from his statutorily defined "current monthly income," which reflects his average income for the prior six calendar months under 11 U.S.C. § 101(10A). *See* Fed. Bankr. Official Form 6 Sch. I.

debtor resides."[5] 11 U.S.C. § 707 (b)(2)(A)(ii)(I). The debtor's expenses also include "actual monthly expenses for the categories specified as Other Necessary Expenses issued by the [IRS]" such as health insurance, disability insurance, and health savings account expenses, and payments on secured debts and priority claims. 11 U.S.C. § 707(b)(2)(A)(ii), (iii), (iv).

The "amounts reasonably necessary to be expended" for above-median debtors must be calculated on Form 22C.[6] Form 22C provides the allowable deductions from "current monthly income" set out in Section 707(b)(2). The form provides entry lines for deductions for each of the specified expenses allowed under the IRS Standards, for other necessary living expenses, and for payments on secured claims and priority claims. Fed. Bankr. Official Form 22C; *see also* App., *infra*, 67a-79a.

The last step in calculating an above-median debtor's "disposable income" on Form 22C is to subtract the total expenses allowed by Section 707(b)(2)—*i.e.*, the "amounts reasonably

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[5] The Schedule J statement of current expenditures, by contrast, requires the debtor to estimate "average or projected" expenses at the time the petition is filed. Fed. Bankr. Official Form 6 Sch. J.

[6] The calculation of income and expenses specified by Section 707(b)(2) and reported on Form 22C is also used under Chapter 7 of the Bankruptcy Code. The calculation is known as the "means test" to determine whether relief under Chapter 7 should be presumed abusive. If the calculation of "current monthly income" less the amounts specified under Section 707(b)(2) is greater than a statutory threshold, Chapter 7 relief is presumed to be abusive. 11 U.S.C. § 707(b)(2).

necessary to be expended" under Section 1325(b)(2)—from the debtor's "current monthly income." Because an above-median debtor's expenses are calculated using IRS Standards rather than actual expenditures, it is possible for the "amounts reasonably necessary to be expended" to exceed the debtor's "current monthly income." In that case, the debtor's "disposable income" is a negative number.

The courts agree that this is the correct way to calculate an above-median debtor's "disposable income" under Section 1325(b)(1)(B) as amended by BAPCPA. Courts have disagreed, however, over the relationship between "disposable income" and "projected disposable income" as those terms are used in that section. "Projected disposable income" is not separately defined from "disposable income." Some courts have concluded that "projected disposable income" is simply a mathematical projection of "disposable income" over the term of the plan. Other courts have construed "projected disposable income" to be unrelated to the statutory definition of "disposable income." The latter courts have chosen to replace BAPCPA's formula with the pre-BAPCPA method of calculating disposable income.[7]

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[7] Because the BAPCPA definition of "disposable income" calls for a calculation of the historical average of the debtor's income in the six months preceding the petition filing date, while the pre-BAPCPA method ascertains the amount of income being received at the time of filing (as reported on Schedule I), the income figures produced by the two methods will frequently differ. Similarly, because the BAPCPA definition of "disposable income" for above-median debtors such as petitioner requires deducting expense amounts that are determined by the IRS (...continued)

b. *"Payments to Unsecured Creditors."* At the same time that Congress changed the calculation of "projected disposable income" in Section 1325(b)(1)(B), it also changed the purpose for which "projected disposable income" is calculated. Before BAPCPA, "projected disposable income" was calculated to determine the total amount of payments the debtor was required to make "under the plan." 11 U.S.C. § 1325(b)(1)(B) (2000). Thus, the "projected disposable income" calculation was made to determine the total amount to be paid to the holders of allowed secured, priority, administrative, and unsecured claims. Under Section 1325(b)(1)(B) as amended by BAPCPA, however, "projected disposable income" is now calculated to determine the amount of payments to unsecured creditors only. 11 U.S.C. § 1325(b)(1)(B).

c. *"Applicable Commitment Period."* The final change that BAPCPA made to Section 1325(b) involves the "applicable commitment period" during which "projected disposable income" is to be paid. Before BAPCPA, Section 1325(b)(1)(B) required that a debtor's "projected disposable income" be paid to creditors for three years if the trustee or an

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while the pre-BAPCPA method looks to the expenses the debtor was actually incurring at the time of filing (as reported on Schedule J), the expense figures produced by the two methods also are apt to be different. There are other factors that will cause the calculations to be different, including that only the BAPCPA definition mandates the exclusion of certain categories of income from "current monthly income" (*see* 11 U.S.C. § 101(10B)) and the inclusion of certain payments of secured debts and priority claims (*see* 11 U.S.C. § 707(b)(2)(A)(iii), (iv)) as "reasonably necessary" expenses.

unsecured creditor objected to confirmation of the plan. 11 U.S.C. § 1325(b)(1)(B) (2000). BAPCPA amended that section to provide that "all the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b). Section 1325(b)(4) states that, "for the purposes of this subsection, the 'applicable commitment period'" is "not less than 5 years" for above-median debtors.[8] 11 U.S.C. § 1325(b)(4).

2. *The Facts.* Petitioner Craig Matthew Frederickson is a resident of Jacksonville, Arkansas, with one dependent. App., *infra*, 67a. Mr. Frederickson is employed as a manager at The Sports Authority. *Id.* On December 13, 2006, Mr. Frederickson filed a petition in bankruptcy court under Chapter 13, along with his Statement of Current Monthly Income and Disposable Income (Form 22C), and appropriate supporting schedules. App., *infra*, 40a.

Because his annualized income at the time he filed the petition was $2,034.32 more than the median family income of $39,463 for a two-person household in Arkansas, Mr. Frederickson is an "above-median" debtor whose disposable income is determined pursuant to 11 U.S.C. § 1325(b)(3) and paragraphs (A) and (B) of 11 U.S.C. § 707(b)(2).

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[8] The applicable commitment period is three years if the debtor is below median, and no commitment period applies if the plan provides that unsecured creditors will be paid in full. 11 U.S.C. § 1325(b)(4)(A).

Calculating Mr. Frederickson's "disposable income" using Form 22C and the Internal Revenue Service Standards, as required by the statute, results in a "disposable income" of $ -95.49.[9] App., *infra*, 40a.

Although Mr. Frederickson had no "disposable income" as defined by the statute and determined on Form 22C, his plan provided that he would pay $600 per month for 48 months, with unsecured creditors to receive a pro-rata distribution. App., *infra*, 48a.[10] Under this plan, unsecured creditors initially were estimated to receive 61% of the scheduled claims. *Id.*

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[9] Mr. Frederickson's current monthly income according to Form 22C is $3,458.11. App., *infra*, 69a. The Form 22C monthly deductions required by 11 U.S.C. § 707(b)(2)(A) and (B), which totaled $3,553.60, were: (a) $825 for the IRS National Standard for Allowable Living Expenses for a 2-person family for food, clothing, household supplies, personal care, and miscellaneous expenses at Mr. Frederickson's income level; (b) $337 for the IRS Local Standard for non-mortgage housing and utilities for a 2-person family in Mr. Frederickson's county; (c) $601 for the IRS Local Standard for mortgage/rent expense for a 2-person family in Mr. Frederickson's county; (d) $260 for the IRS Local Standard for transportation in Mr. Frederickson's locality; (e) $71 for the allowable IRS Local Standard for transportation ownership/lease expense for one vehicle in Mr. Frederickson's locality; (f) $653.42 in actual expenses for monthly taxes; (g) $50 for actual health care expenses; (h) $85 for actual necessary telecommunication services; (i) $84.91 for actual health and disability insurance; (j) $29 in actual additional food and clothing expenses; and (k) $557.27 for payments on secured claims, priority claims, and administrative expenses of the bankruptcy. *Id.* at 71a-79a.

[10] Under the pre-BAPCPA method of calculating disposable income by subtracting current expenditures reported on Schedule J from current income reported on Schedule I, Mr. Frederickson's "monthly net income" was $606. App., *infra*, 3a, 86a.

at 40a. The trustee determined at a later date that unsecured creditors would receive approximately 75% of their claims. *Id.* at 21a; C.A. App. Ex. 6A ¶ 3.

3. *The Bankruptcy Court's Order.* The trustee objected to the confirmation of Mr. Frederickson's plan, arguing that Section 1325(b)(4)'s five-year "applicable commitment period" for above-median debtors meant that Mr. Frederickson's plan could not be approved for 48 months, and must instead provide for a 60-month repayment term. App., *infra*, 41a. The trustee stipulated that Mr. Frederickson's "disposable income according to Form 22C is a negative amount," and accordingly conceded that "there is no minimal amount which must be paid to the general unsecured creditors by virtue of the disposable income plan confirmation requirements." *Id.* at 46a n.5 (quoting Resp. C.A. Br., at 9).

The bankruptcy court agreed with the trustee's concession. The court observed that "[a]lthough the discrepancy between the disposable income on Schedules I and J and Form 22C appears problematic, the [C]ode is clear" and mandates that an above-median debtor's expenses "be determined by the [Section 707(b)(2)] means test." *Id.* at 46a. The court further observed that, as a result of the Section 707(b)(2) calculation, an above-median debtor "may have 'excess' income that the debtor is not required to commit to the payment of unsecured creditors." *Id.* at 47a. The court concluded that, because "[t]here is nothing in the [C]ode that suggests any latitude in this interpretation . . . the debtor has no projected disposable income to commit to the plan for the benefit of unsecured creditors according to Form 22C." *Id.*

The trustee argued, however, that the "applicable commitment period" is a "temporal requirement," and that the plan must extend for five years even if the debtor has no projected disposable income to apply to unsecured creditors during that time. *Id.* at 48a. The bankruptcy court agreed that the five-year requirement is "temporal," but held that because Mr. Frederickson's projected disposable income was negative, the applicable commitment period did not apply. *Id.* at 49a-50a. The court held that "the applicable commitment period is relevant 'for purposes of [Section 1325(b)]' only if the above median family income debtor actually has 'projected disposable income' to make payments to unsecured creditors under the plan." *Id.* at 51a (quoting 11 U.S.C. § 1325(b)(4)). The court accordingly overruled the trustee's objection and confirmed Mr. Frederickson's plan.

4. *The Bankruptcy Appellate Panel's Opinion.* The bankruptcy appellate panel affirmed. App., *infra*, 18a-31a. The court began by comparing the pre-BAPCPA method for calculating "disposable income," which produces "a snapshot of the debtor's current financial situation," with the BAPCPA method, which "provides an extended view of the debtor's financial history." *Id.* at 20a. The court observed that, while BAPCPA provided a new definition of "disposable income," "the lack of a statutory definition of 'projected disposable income' has led to varying interpretations as bankruptcy courts across the country struggle to ascertain what the BAPCPA amendments mean." *Id.* at 25a. The court noted that the courts had adopted different approaches to calculating "projected disposable

income," with some using the pre-BAPCPA method derived from the debtor's statements of income and expenses reported on Schedules I and J (*see* notes 4 & 5, *supra*), and others adopting a "plain-meaning approach using only the current monthly income figure from Form 22C." App., *infra*, 26a; *id.* at 25a-29a (citing cases). After examining the competing approaches, the court adopted the "plain meaning approach," holding that "'[p]rojected disposable income' is the disposable income calculated on Form 22C extrapolated over the applicable commitment period." *Id.* at 30a.

The court also concluded that "[i]f there is no disposable income, there is no applicable commitment period, and a debtor may obtain confirmation of a plan that is shorter than five years." *Id.* at 31a.

5. *The Court Of Appeals' Decision.* The Eighth Circuit reversed. While acknowledging the trustee's concession that "because Frederickson does not have any 'disposable income' . . . he does not have a minimum payment requirement under 11 U.S.C. §1325(b)(1)(B)," the court of appeals noted that "this concession assumes that the definition of 'projected disposable income' is the same as the definition of 'disposable income.'" App., *infra*, 10a n.5. Because it disagreed with that assumption, the court decided that it "must consider the proper interpretation of 'projected disposable income'" for itself. *Id.* at 10a & n.5.

The court of appeals recognized that BAPCPA was intended to "reduce[] the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and

expenses." *Id.* at 11a. The court further recognized that, to accomplish that objective, BAPCPA "rigidly defined 'disposable income' in 11 U.S.C. § 1325(b)(2)." *Id.* The court concluded, however, that because Congress "did not define 'projected disposable income' as used in 11 U.S.C. § 1325(b)(1)(B)," the proper calculation of that number "is not clear." *Id.*

The court perceived a "problem" with determining "projected disposable income" by "simply multiply[ing] the debtor's 'disposable income'" by the number of months in the plan—the method used pre-BAPCPA. *Id.* at 12a. The court reasoned that the "problem arises because 'disposable income' is based on a debtor's historical income and IRS tables," which "does not take into consideration a debtor's current financial situation, which may have changed." *Id.* The court also noted that "the debtor's actual expenses may be far less than the regional averages that are assumed in the 'disposable income' calculation." *Id.* at 13a.

The court concluded that, to avoid "anomalous, and perhaps even absurd, results," "a distinction" should be drawn between a debtor's "disposable income" and the debtor's "projected disposable income." *Id.* "[P]rojected disposable income," the court asserted, "necessarily contemplates a forward-looking number," and therefore "bankruptcy courts will continue to have some discretion over the calculations of each individual debtor's financial situation." *Id.* The court held that "disposable income" from Form 22C "is a starting point," but that "the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income

and expenses as reported on Schedules I and J." *Id.* at 14a. The court reasoned that this approach "realistically determines how much a debtor can afford to pay his creditors and maximizes the amount the debtor must pay to his unsecured creditors." *Id.* at 15a.

Applying what it termed a "reality-based" approach, the court concluded that, although Mr. Frederickson had no "disposable income" as defined by the statute, he "actually does have projected disposable income." *Id.* at 16a. The court reasoned that the bankruptcy court thus "erred by confirming Frederickson's plan," which applied what the court of appeals viewed as his "projected disposable income" (derived from Schedules I and J rather than Form 22C) to make payments to unsecured creditors for only 48 months, contrary to 11 U.S.C. § 1325(b)(4), which requires an above-median debtor's "projected disposable income" to be applied to make payments for 60 months. *Id.*

The court acknowledged that its holding diverged from that of the Ninth Circuit in *Maney* v. *Kagenveama*, 541 F.3d 868 (9th Cir. 2008). App., *infra*, 17a. The court stated: "With all due respect to the Ninth Circuit's opinion, we believe that the approach we have taken will more fully accomplish that which Congress intended to achieve through the enactment of BAPCPA." *Id.*

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision merits this Court's review. As the court of appeals recognized, its decision squarely conflicts with the Ninth Circuit's decision in *Maney* v. *Kagenveama*, 541 F.3d

868 (9th Cir. 2008), which held that a Chapter 13 debtor's "projected disposable income" is her statutorily defined "disposable income" multiplied by the applicable commitment period. *Id.* at 871-75. Moreover, the Tenth Circuit has recently sided with the Eighth Circuit, holding that the Chapter 13 debtor's statutory "disposable income" calculation may be disregarded upon an "adequate showing of changed circumstances." *Hamilton* v. *Lanning*, 545 F.3d 1269, 1282 (10th Cir. 2008).

This circuit conflict should be resolved now. Since Congress amended the law in 2005, the courts of appeals, bankruptcy appellate panels, bankruptcy courts, and commentators have come to diametrically opposite conclusions about how to calculate "projected disposable income." The recent spike in bankruptcy filings, including filings under Chapter 13, ensures that the issue will continue to create disarray in the lower courts until resolved by this Court. *See* Administrative Office of the U.S. Courts, News Release, *Bankruptcy Filings Over One Million For Fiscal Year 2008*, http://www.us-courts.gov/Press_Releases/2008/BankruptcyFilingsDec2008.cfm (noting that bankruptcy filings in Fiscal Year 2008 were "up more than 30 percent" compared to Fiscal Year 2007 filings and that Chapter 13 filings "rose 14 percent").

Moreover, the question presented implicates a core function of the bankruptcy courts—namely, the determination of how much money a Chapter 13 debtor must pay to unsecured creditors to overcome an objection to plan confirmation. A Chapter 13 debtor's ability to obtain plan confirmation and the amount he or she must pay unsecured creditors

should not turn, as it does now, on the state of his or her residence.

The Eighth Circuit's decision also renders the changes that Congress made to Section 1325(b) in BAPCPA a nullity. Under the Eighth Circuit's approach, a bankruptcy court may entirely reject the statutorily mandated calculation of "disposable income" in determining whether the plan commits all "projected disposable income" to unsecured creditors, if the court concludes that the statutory calculation produces "anomalous" results. App., *infra*, 13a. Instead, a bankruptcy court may rely, as the Eighth Circuit did here, on the "debtor's actual income and expenses as reported on Schedules I and J"—precisely the pre-BAPCPA concept of "disposable income" that Congress rejected. The court's desire to achieve results that it believed would more closely reflect congressional intent provides no basis for repudiating the BAPCPA amendments to Section 1325(b). Further review is warranted to make clear that the bankruptcy courts must apply Congress's chosen methodology for determining a debtor's "projected disposable income."

I. The Circuits Are Split Over The Meaning Of "Projected Disposable Income."

As the court of appeals acknowledged, its decision in this case conflicts with that of the Ninth Circuit in *Kagenveama*. App., *infra*, 17a. The split on the "projected disposable income" question is even more pronounced than would appear from the court of appeals' opinion, because after the Eighth Circuit's decision, the Tenth Circuit issued an opinion in *Lanning* that agrees with the Eighth but is contrary to the Ninth.

Contrary to the decision of the court below, the Ninth Circuit held, in *Kagenveama*, that "'projected disposable income' [under Section 1325(b)(1)(B)] means 'disposable income,' as defined by § 1325(b)(2), projected over the 'applicable commitment period.'" 541 F.3d at 871-72. As here, the debtor's "disposable income" on Form 22C was negative, she voluntarily proposed a payment plan of less than five years, and the trustee objected to the length of the plan. *Id.* at 871. The trustee contended, as the Eighth Circuit held here, that the debtor did have "projected disposable income" because "that phrase connotes a forward-looking concept that only uses the 'disposable income' calculation as a starting point." *Id.* at 872.

The Ninth Circuit rejected the trustee's position. Because "[r]eading the statute as requiring 'disposable income,' as defined in subsection (b)(2), to be projected out over the 'applicable commitment period' to derive the 'projected disposable income' amount is the most natural reading of the statute," the Ninth Circuit explained, "it is the one we adopt." *Kagenveama*, 541 F.3d at 872. The court observed that "BAPCPA significantly changed the definition of 'disposable income.'" *Id.* at 873 n.2. The court noted that "[b]efore BAPCPA, 'disposable income,'" including the determination of "reasonably necessary" expenses, was an "amorphous standard [that] produced determinations . . . that varied widely among debtors in similar circumstances." *Id.* Congress in BAPCPA "replaced the old definition of what was 'reasonably necessary' with a formulaic approach for above-median debtors." *Id.*

The Ninth Circuit noted that "Section 1325 uses the term 'disposable income' in only two places—§ 1325(b)(1)(B) ('projected disposable income') and § 1325(b)(2) (defining 'disposable income')." *Kagenveama*, 541 F.3d at 872. The court held that it would render the definition of "disposable income" surplusage if an amount of income other than the amount produced by the statutory formula could be substituted in the determination of "projected disposable income." *Id.* at 872-73. "If 'disposable income' is not linked to 'projected disposable income,'" the court explained, "then it is just a floating definition with no apparent purpose." *Id.* at 873 (quoting *In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006)). Accordingly, the court held that "'disposable income,' as defined in § 1325(b)(2), must be 'projected' in order to derive 'projected disposable income.'" *Id.* at 873.

The Ninth Circuit also rejected the trustee's suggestion that the calculation of "disposable income" as prescribed by the statute serves as the "presumptively correct" calculation that could be "rebutted or supplemented by other evidence" such as "anticipated changes in income or expenses." *Kagenveama*, 541 F.3d at 874. The court noted that there is no more support in the text of the statute for the presumption approach than there is for viewing the concept of "projected disposable income" as entirely unrelated to the statutory definition of "disposable income." *Id.* at 874-75.

Because the debtor had no "disposable income" as defined by the statute, the Ninth Circuit held that she also had no "projected disposable income." The trustee argued that the debtor nevertheless had to

make payments to unsecured creditors for five years, the length of the "applicable commitment period" under Section 1325(b)(4). The court rejected that contention as well. Relying on the "plain language of the statute," the court held that "the 'applicable commitment period' requirement is inapplicable to a plan submitted voluntarily by a debtor with no 'projected disposable income.'" 541 F.3d at 875. The court explained that "Section 1325(b)(4) does not contain a freestanding plan length requirement." *Id.* at 876. Rather, the court observed, "its exclusive purpose is to define 'applicable commitment period' for purposes of the [projected disposable income] calculation." *Id.* The court therefore concluded that "[w]hen there is no 'projected disposable income,' there is no 'applicable commitment period.'" *Id.*

The Ninth Circuit accordingly affirmed the bankruptcy court's order overruling the trustee's objection to the debtor's plan. As here, although the debtor had no "disposable income" as reported on Form 22C, the plan included payments to unsecured creditors for less than five years. Had Mr. Frederickson resided within the Ninth Circuit, his plan would likewise have been confirmed over the trustee's objection. Instead, because he resides in the Eighth Circuit, his plan was rejected on the ground that, despite his lack of statutory "disposable income," he has "projected disposable income" according to the pre-BAPCPA methodology and thus must apply that amount to pay unsecured creditors for five years. App., *infra*, 10a-17a.

Since the Eighth Circuit issued its decision in this case, another circuit has decided the "projected disposable income" question. In *Lanning*, the Tenth

Circuit confronted the question in a case where the debtor's income had decreased since filing the petition and the debtor therefore had *less* than her "disposable income" reported on Form 22C available to pay unsecured creditors. 545 F.3d at 1271-72. The debtor had received a buyout from her employer in the six months prior to filing her bankruptcy petition. *Id.* at 1271. Accordingly, the debtor's Form 22C "current monthly income" was several thousand dollars higher than her income as reported on Schedule I, which was based on a job she acquired after accepting the buyout. The debtor's plan thus proposed to pay a monthly amount that was less than her "disposable income" calculated on Form 22C.

The trustee objected, and the bankruptcy court applied a "presumption" that the debtor's "disposable income" as reported on Form 22C "constituted 'projected disposable income' under § 1325(b)(1)(B), subject to a showing 'that there has been a substantial change in circumstances such that the numbers contained in Form [22C] are not commensurate with a fair projection of the debtor's budget in the future.'" *Lanning*, 545 F.3d at 1272-73.

The Tenth Circuit Bankruptcy Appellate Panel and the Tenth Circuit affirmed. *Id.* at 1274, 1282. After reviewing decisions on both sides of the question, including the Ninth Circuit's decision in *Kagenveama*, the Tenth Circuit observed that the "forward-looking approach" (adopted by the Eighth Circuit in this case and other courts) renders the statutory definition of disposable income "nearly meaningless." *Id.* at 1278. The court concluded that this "difficulty" could be remedied, however, by

"read[ing] a presumption into the statute" that "the defined term 'disposable income' is just a starting point—which can be rebutted by showing a substantial change in circumstances." *Id.* The court acknowledged that this approach "requires a certain disregard of the notion that Congress knows how to create a presumption when it intends one." *Id.* at 1278-79.

The court nevertheless adopted the "forward-looking approach," subject to application of its "presumption." *Id.* at 1279. By giving bankruptcy courts discretion to deviate from the statutorily prescribed method for determining a debtor's "projected disposable income," the Tenth Circuit's decision conflicts with the Ninth Circuit in *Kagenveama* and aligns with the Eighth Circuit's decision below.

The courts of appeals are thus split 2-1 over the fundamental question whether "projected disposable income" is a mathematical projection of the Chapter 13 debtor's "disposable income" as defined in BAPCPA or whether bankruptcy courts are instead permitted to substitute the pre-BAPCPA methodology at their discretion.

II. The Question Is Recurring and Important.

"Arguably no change in BAPCPA has generated as fundamental a difference in the bankruptcy courts' reported opinions as how to determine projected disposable income for above median income debtors in chapter 13." Thomas F. Waldron and Neil M. Herman, *Principled Principles of Statutory Interpretation: A Judicial Perspective*

after Two Years of BAPCPA, 81 Am. Bankr. L. J. 195, 220 (Summer 2007). In the three years since BAPCPA was passed, cases presenting the "projected disposable income" question have arisen in the bankruptcy courts of every circuit, resulting in conflicting decisions in the courts of appeals, the circuits' bankruptcy appellate panels, and the bankruptcy courts.[11]

The split in authority has been noted by numerous courts and scholars. *See, e.g.*, App. *infra*, 17a (expressly rejecting *Kagenveama*); *Lanning*, 545 F.3d at 1275 (discussing "judicial decisions

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[11] *Compare, e.g., Kagenveama*, 541 F.3d at 871-75 (plain-meaning approach); *In re Hedge*, 394 B.R. 463, 467 (Bankr. S.D. Ind. 2008) (same); *In re Green*, 378 B.R. 30, 35 (Bankr. N.D.N.Y. 2007) (same); *In re Spruch*, No. 08-90239-BHL-13, 2008 Bankr. LEXIS 3110, at *10 (Bankr. S.D. Ind. Nov. 10, 2008) ("[T]his [c]ourt continues to view the 9th Circuit's decision in *Kagenveama* as the better reasoned course." (citation omitted)); *Musselman* v. *eCast Settlement Corp.*, 394 B.R. 801, 810 (E.D.N.C. 2008) (holding that the "multiplicative approach" is "more natural and more clearly in harmony with the text of § 1325(b)"); *In re Bardo*, 379 B.R. 524, 528 (Bankr. M.D. Pa. 2007) ("Congress could have spoken no clearer than abandoning the anticipated income approach and selecting language that pegs projected current income on historical figures."); *In re Winokur*, 364 B.R. 204, 206 (Bankr. E.D. Va. 2007) (adopting plain meaning approach because "[t]he court has no discretion to substitute its judgment for that of Congress"); *In re Fuger*, 347 B.R. 94, 99 (Bankr. D. Utah 2006) (multiplier approach), *with, e.g.*, App., *infra*, 10a-17a (applying the forward-looking approach); *Lanning*, 545 F.3d at 1276 (same); *In re Briscoe*, 374 B.R. 1, 19 (Bankr. D.D.C. 2007); *Hildebrand* v. *Petro*, 395 B.R. 369, 375-76 (B.A.P. 6th Cir. 2008) (same); *Kibbe* v. *Sumski*, 361 B.R. 302, 308 (B.A.P. 1st Cir. 2007) (same); *Spalding* v. *Truman*, NO. 4:08-CV-064-Y, 2008 U.S. Dist. LEXIS 81682 (N.D. Tex. Oct. 14, 2008) (same); *In re Raulerson*, 395 B.R. 157, 160 (Bankr. M.D. Fla. 2008) (same).

representative of the two interpretations of post-BAPCPA § 1325(b)(1)(B)"); *Hildebrand* v. *Petro*, 395 B.R. 369, 375-376 (B.A.P. 6th Cir. 2008); *Musselman* v. *eCast Settlement Corp.*, 394 B.R. 801, 807 (Bankr. E.D.N.C. 2008) (citing 20 cases); *In re Green*, 378 B.R. 30, 35 (Bankr. N.D.N.Y. 2007) (BAPCPA rendered Section 1325(b) "a murky stew of conflicting judicial opinions."); Lisa Barbacci Afarin, *Section 1325(b)(1)(B) and the Predicament of Determining Projected Disposable Income*, 17 J. Bankr. L. & Prac. 2, 5 (Apr. 2008) (discussing the "two lines of cases that have emerged regarding how to determine 'projected disposable income'"); Randolph J. Haines, *Chapter 11 May Resolve Some Chapter 13 Issues*, 8 Norton Bankr. L. Adviser 1 (Aug. 2007) (noting that the "courts are severely split on the interpretation" of the term "projected disposable income" in Section 1325(b), an issue that is "fundamental to post-BAPCPA Chapter 13 plans"); Jeffrey R. Drobish, *The Forbidden Crystal Ball: Interpreting Projected Disposable Income for Chapter 13 Bankruptcy Plans after BAPCPA*, 85 Wash. U. L. Rev. 185, 199 (2007); Waldron, *supra*, 81 Amer. Bankr. L. J. at 195-96. The sheer number of cases presenting the question demonstrates its importance to the proper administration of the Bankruptcy Code.

The issue in this case is sufficiently developed for this Court's review. As one bankruptcy judge lamented, "Much has been written by thoughtful and concerned judges on this issue. Another opinion would only repeat the already well-known analyses." *In re Winokur*, 364 B.R. 204, 205 (Bankr. E.D. Va. 2007). The issue has now been addressed by three circuits, five bankruptcy appellate panels, and many

more bankruptcy courts.[12] The issue has also been the subject of legal scholarship. These courts and commentators have thoroughly examined the text, purpose, structure, and legislative history of Section 1325(b)(1)(B), rendering the circuit conflict ripe for this Court's resolution.

Moreover, the question presented implicates the fundamental concept of "disposable income" and how much money a debtor must pay unsecured creditors to obtain bankruptcy relief. As shown by the three circuit decisions forming the split, the proper interpretation of "projected disposable income" does not necessarily favor either debtors or creditors in Chapter 13 bankruptcy proceedings. A debtor who experiences a sudden drop in income just before filing might prefer the pre-BAPCPA methodology, while a debtor who experiences a sudden increase might prefer the BAPCPA calculation based on historical data. Regardless of what debtors or creditors might prefer, the question is a principled point of disagreement among courts at every level in the adjudication of bankruptcy cases over the proper interpretation of the Bankruptcy Code.[13] Given the large number of courts to have

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[12] The Court has regularly granted certiorari in bankruptcy cases with a similar split among the courts of appeals. *See, e.g.*, *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, No. 07-312, Cert. Pet. 9-17 (asserting 2-1 split); *Marrama* v. *Citizens Bank of Mass.*, No. 05-996, Cert. Pet. 5-6 (asserting 3-1 split); *Howard Delivery Service, Inc.* v. *Zurich American Ins.*, No. 05-128, Cert. Pet. 9-11 (asserting 3-1 split).

[13] The question is not limited to above-median debtors. The Eighth and Tenth Circuits' approach permits the bankruptcy court to disregard the Code's definition of "current monthly (...continued)

considered the question and the fact that many courts have lined up on each side of the divide, the courts are unlikely to reconcile on their own and need guidance from this Court.

The Constitution empowers Congress to pass "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I Sec. 8 Cl. 4. Uniformity in bankruptcy law is also important as a practical matter because of the increasing number of bankruptcy filings. *See* p. 17, *supra* (citing report by the Administrative Office of the U.S. Courts). Given the non-uniform state of the bankruptcy laws, whether a debtor's plan can be confirmed depends on the accident of the court in which it is filed, rather than on a uniform interpretation of the Bankruptcy Code. Only this Court can resolve the split in authority on the fundamental issue in this case and thereby restore the uniformity of the bankruptcy laws that the Constitution requires.

III. The Decision Below Is Incorrect.

"The starting point in discerning congressional intent is the existing statutory text and not the predecessor statutes." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Id.*

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income," which is used by all debtors, when determining "projected disposable income." *See, e.g.*, *Kibbe*, 361 B.R. at 304 (below-median debtor).

(quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Congress in BAPCPA changed the definition of "disposable income" under Section 1325(b)(1)(B) in two significant ways. First, on the income side, Congress mandated calculation of the debtor's average income for the six months preceding the filing of the petition. *See* 11 U.S.C. § 1325(b)(2) (defining "disposable income" as "current monthly income," which, in turn, is defined as a six-month historical average and contains specified exclusions such as social security benefits, *see* 11 U.S.C. § 101(10A)). Second, on the expense side, for above-median debtors, Congress specifically defined the allowable deductions from "current monthly income" according to standards issued by the IRS. Nothing in the statute suggests that courts are free to adjust either the debtor's "current monthly income" or allowed expenses to arrive at a different "disposable income."

Section 1325(b)(2) states that "disposable income" is defined "for the purposes of this subsection," *i.e.*, Section 1325(b). The only other mention of "disposable income" in that section is the requirement that "all of the debtor's *projected disposable income* to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). Thus, if BAPCPA's definition of "disposable income" is to serve any purpose, it must be to calculate what is "projected" in determining the amount a debtor must pay unsecured creditors over the life of the plan. That is precisely how courts understood the function

of the word "projected" before Congress changed the definition of "disposable income." *See* App., *infra*, 12a (pre-BAPCPA, the court "would simply multiply the debtor's 'disposable income' by the number of months" in the plan).

Reading "projected disposable income" to mean "disposable income" multiplied by the number of months in the plan is also consistent with the common meaning of "projected." "Projected" is defined to mean "thrown or as if thrown or cast forward." *Webster's Third New International Dictionary*, at 1813 (1993). "Projected" in Section 1325(b)(1)(B) modifies the defined term "disposable income," indicating that it is the debtor's "disposable income," as defined, that is to be "cast forward" into the future. This reading is confirmed elsewhere in the Bankruptcy Code, which refers to "projected disposable income of the debtor (as defined in section 1325(b)(2))." 11 U.S.C. § 1129(a)(15)(B).[14] Because "projected disposable income" is *not* defined, Section 1129 can only be referring to a projection of the defined term, "disposable income."

The Eighth Circuit's decision holding to the contrary is not persuasive. The court acknowledged

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[14] Section 1129(a)(15)(B) provides that a Chapter 11 plan for an individual debtor may be confirmed over the objection of the holder of an allowed unsecured claim if one of two conditions is met, one of which is that "the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period . . . , or during the period for which the plan provides payments, whichever is longer." 11 U.S.C. § 1129(a)(15)(B).

that, pre-BAPCPA, it would "simply multiply the debtor's 'disposable income' by the number of months" in the plan to determine the amount of "projected disposable income" available to pay creditors. App., *infra*, 12a. The Eighth Circuit nevertheless concluded that it could now disregard the *amended* definition of "disposable income" for purposes of determining "projected disposable income" because that definition is "based upon a debtor's historical income and IRS tables that provide regional averages for common expenses" and thus "does not take into consideration a debtor's current financial situation." *Id.* In other words, the Eighth Circuit declined to project into the plan period the BAPCPA calculation of "disposable income" because it would not necessarily provide an "accurate" picture of the debtor's ability to pay. *Id.* Instead, the Eighth Circuit applied the pre-BAPCPA method of using Schedules I and J to determine "disposable income." In doing so, it sanctioned the nullification of BAPCPA's definition of "disposable income" and Congress's attendant objective—that the Eighth Circuit itself acknowledged—of "reduc[ing] the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses." *Id.* at 11a.

The Eighth Circuit was apparently convinced that by rejecting Congress's chosen methodology, it was actually advancing congressional intent to "requir[e] debtors to pay more to their unsecured creditors." *Id.* But any "problem" (*id.* at 12a) with applying the definition of "disposable income" as it

appears in the text was created by Congress and is appropriately remedied by Congress, not the courts.

The Eighth Circuit's approach not only nullifies Congress's attempt to bring more uniformity to the calculation of "projected disposable income," but it also distorts the payment scheme that BAPCPA established. For example, Congress excluded social security benefits from "disposable income," but social security benefits will be a source of income from which payments to unsecured creditors can be required in courts applying the Eighth Circuit's approach. *See* Fed. Bankr. Official Form 6, Sch. I, Line 11. Equally problematic is the fact that the pre-BAPCPA calculation yielded an amount that was used to make *all* payments under the plan, including secured debt, priority claims, and administrative expenses. But under BAPCPA, the calculation of "disposable income" takes into account amounts to be paid for secured claims, priority claims, and administrative expenses. BAPCPA thus made a corresponding amendment to Section 1325(b)(1)(B) to make clear that "projected disposable income" will be applied to make payments to *unsecured creditors only*. Under the Eighth Circuit's approach, if all of a debtor's "projected disposable income" under the pre-BAPCPA methodology must now be applied only to pay unsecured debt, then a debtor may have little or no income available to pay the superior claims.

The Tenth Circuit's decision, while purporting to impose a "presumption"-based limitation on the Eighth Circuit's "forward looking" approach, suffers from the same flaws. Indeed, the Tenth Circuit's approach is no less divorced from the text of the

Code. Nothing in Section 1325(b) suggests that courts may ignore the statutory definition of "disposable income," whether on a showing of "changed circumstances" (*Lanning*, 545 F.3d at 1282) or not (App., *infra*, 14a). By allowing courts to reject the BAPCPA definition, the Tenth Circuit's approach permits the very exercise of discretion that Congress purposefully took away.

Furthermore, other sections of BAPCPA show that Congress knew how to create a presumption when it wanted to. *See* 11 U.S.C. § 707 (creating a presumption of abuse for Chapter 7 debtors who fail the "means test"). Congress employed no such language in Section 1325(b). Thus, the so-called "forward-looking" approach that uses BAPCPA's calculation of "disposable income" as merely a "starting point" (App., *infra*, 14a) or provides a presumption in its favor (*Lanning*, 545 F.3d at 1279), finds no support in the text, purpose, or structure of Section 1325(b) and should be rejected by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

O.C. "Rusty" Sparks
Clark, Byarlay & Sparks
620 W. Third Street
Suite 100
Little Rock, AR 722201

Jonathan L. Marcus
Counsel of Record
Robert A. Long, Jr.
Michael St. Patrick Baxter
Theodore P. Metzler, Jr.
Covington & Burling LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Petitioner

January 2009

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-3391

In re: Craig Matthew Frederickson, Debtor.

David D. Coop, Appellant,

v.

Craig Matthew Frederickson, Appellee.

National Association of Consumer Bankruptcy Attorneys, Amicus on Behalf of Appellee.

Appeal From the United States Bankruptcy Appellate Panel for the Eighth Circuit

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Submitted: April 14, 2008

Filed: October 27, 2008

Before WOLLMAN, BEAM, and RILEY, Circuit Judges.

WOLLMAN , Circuit Judge.

This appeal requires us to examine the meaning and application of the phrases "projected disposable income" and "applicable commitment period" in 11 U.S.C. § 1325(b), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The specific question before us is whether an above-median Chapter 13 debtor's plan must extend for five years, *i.e.*, the length of the "applicable commitment period," or whether a bankruptcy court can confirm a shorter plan period when the debtor has a negative "disposable income" as defined in 11 U.S.C. § 1325(b)(2) and calculated on Form 22C. The bankruptcy court held that a shorter plan period is permissible and thus confirmed Craig Matthew Frederickson's (the debtor's) proposed forty-eight-month plan. *In re Frederickson*, 368 B.R. 825 (Bankr. E.D. Ark. 2007). The Bankruptcy Appellate Panel for the Eighth Circuit affirmed. *Coop* v. *Frederickson (In re Frederickson)*, 375 B.R. 829 (B.A.P. 8th Cir. 2007). Having jurisdiction under 28 U.S.C. § 158(d), we reverse.

I. Background

The facts of this case are not in dispute. Frederickson's current monthly income is above the median income level for his state of residence, and therefore he is an "above-median" debtor. *See* 11 U.S.C. § 1325(b)(3). His disposable income, defined in 11 U.S.C. § 1325(b)(2) and calculated on Form 22C,[1]

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[1] "Disposable income" is defined as the "current monthly income received by the debtor . . . less amounts reasonably necessary to (...continued)

is a negative amount ($ - 95.49). The parties agree that because of this calculation, Frederickson has no "projected disposable income" as referred to in 11 U.S.C. § 1325(b)(1)(B). Nevertheless, the calculations on Frederickson's Schedule I (current income) and Schedule J (current expenditures) indicate that he has a monthly net income of $ 606. Frederickson proposed a plan to pay his unsecured creditors $ 600 per month for forty-eight months. Under this plan, Frederickson's unsecured creditors will receive approximately sixty-one percent of their claims. The trustee objected to this plan because it did not extend for the full five-year "applicable commitment period" referred to in 11 U.S.C. § 1325(b)(4)(A)(ii). If the plan extended for five years, it is estimated that Frederickson's unsecured creditors would receive almost all, if not all, of their claims.

A bankruptcy court may confirm a Chapter 13 debtor's plan if the requirements of 11 U.S.C. § 1325(a) are satisfied. If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, however, the bankruptcy court may approve the plan only if (A) the plan provides for payment of 100% of claims, or (B) "the plan provides that all of the debtor's projected

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be expended . . . ." 11 U.S.C. § 1325(b)(2). "Current monthly income" is based upon historical figures, namely, the average monthly income the debtor received during the six months prior to filing for bankruptcy. 11 U.S.C. § 101(10A). For above-median debtors, "[a]mounts reasonably necessary to be expended" are calculated in accordance with subparagraphs (A) and (B) of 11 U.S.C. § 707(b)(2). 11 U.S.C. § 1325(b)(3).

disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1).

This statutory rubric works when an above-median debtor's disposable income calculated under Form 22C results in a positive number. But because Frederickson has a negative disposable income as calculated on Form 22C and the trustee objected to the proposed plan, the bankruptcy court was required to weigh conflicting interpretations of the relevant portions of the statute. One possible interpretation of 11 U.S.C. § 1325(b)(1)(B) is that if the debtor does not have any "disposable income," and therefore does not have any "projected disposable income," the debtor's proposed plan can be confirmed regardless of the amount proposed to be paid and the length of the plan because the amount of projected disposable income "to be received in the applicable commitment period" is $ 0.[2] A second possible interpretation is that the "applicable commitment period," as defined in 11 U.S.C. § 1325(b)(4) and used in 11 U.S.C. § 1325(b)(1)(B), is a temporal requirement that must be met even if the debtor does not have any projected disposable income.

The parties have stipulated that Frederickson does not have any "projected disposable income" and therefore "there is no minimal amount which must

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[2] Of course, the good faith, feasibility, and other general requirements of 11 U.S.C. § 1325(a) must still be met.

be paid to the general unsecured creditors." *See In re Frederickson*, 368 B.R. at 828 n.5. This concession assumes that the requirement set forth in 11 U.S.C. § 1325(b)(1)(B) creates a minimum payment requirement and that no minimum exists if the debtor has no projected disposable income. Accordingly, the bankruptcy court determined that a debtor's proposed plan could be confirmed over the trustee's objections despite the fact that it does not extend for the full applicable commitment period because there is no minimum payment and therefore the applicable commitment period does not apply. At the same time, the bankruptcy court determined that when a debtor has positive disposable income, the "applicable commitment period" applies and creates a temporal requirement, *i.e.*, a minimum plan length requirement. Thus, the bankruptcy court held that when a trustee objects to an above-median debtor's proposed plan in situations in which the debtor has positive disposable income, the plan cannot be confirmed unless it provides for payment of all projected disposable income over a period of five years, 11 U.S.C. § 1325(b)(1)(B), or the plan provides for payment in full of all allowed unsecured claims, 11 U.S.C. § 1325(b)(4)(B).

Judge Federman dissented from the bankruptcy appellate panel's affirmance, concluding that the "applicable commitment period" is always a temporal requirement. Citing the House Report on § 1325, he wrote that

> BAPCPA was intended by Congress to require that higher income debtors either pay 100% of unsecured claims, or make payments for a period of 5 years.

> While there is scant legislative history for most of the BAPCPA provisions, the House Report on § 1325(b) makes clear that the applicable commitment period is a durational requirement for the Chapter 13 plan, and not just, as the majority holds, a multiplier.

In re Frederickson, 375 B.R. at 837 (Federman, J., dissenting).

II. Discussion

Because we are reviewing only legal conclusions made by the bankruptcy court, our review is de novo. *DeBold* v. *Case*, 452 F.3d 756, 761 (8th Cir. 2006).

To determine the congressional intent of statutory text, we begin by looking at the text itself. *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004). Generally, when the statutory text is plain and does not lead to an absurd result, the sole function of the courts is to enforce the plain language of the statute. *Id.* When the text leads to a result that is seemingly at odds with the congressional intent of the text, however, the plain language is not conclusive. *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989).

Along with these general rules of statutory construction, the Supreme Court has also acknowledged that in determining the true congressional intent of a statute it can be appropriate to consider all available evidence of that intent rather than limiting the analysis to the text of the statute. *Koons Buick Pontiac GMC, Inc.* v. *Nigh*,

543 U.S. 50, 65-66, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004) (Stevens, J., concurring) (citing *Wisc. Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 611 n.4, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991), and other Supreme Court cases). Thus, when the statutory text is not altogether clear and there is more than one plausible interpretation of the text, it is proper to consult extratextual sources to determine congressional intent. *Id.*; *see also id.* at 66-67 (Kennedy, J., concurring).

We are presented with that very situation in the case before us. The debtor and the trustee have presented possible interpretations of the text that are supported by authority. Indeed, the differing outcomes of the bankruptcy courts that have examined this issue to date indicate that the language of 11 U.S.C. § 1325(b) is not at all clear. *See In re Laroy Davis*, 392 B.R. 132, 137-41, 2008 Bankr. LEXIS 2393 (Bankr. E.D. Pa. 2008) (outlining cases that are divided on how to calculate a debtor's "projected disposable income"); *id.* at 143-46, 2008 Bankr. LEXIS 2393 (outlining cases that are divided on whether the "applicable commitment period" is a monetary or temporal requirement); *see also In re Green*, 378 B.R. 30, 33 (Bank. N.D. N.Y. 2007) (noting that BAPCPA rendered § 1325(b) a murky stew of conflicting judicial opinions about the plain language meaning of common words and phrases contained in the statute itself and the Congressional intent behind it"); *In re Slusher*, 359 B.R. 290, 300 (Bankr. Nev. 2007) ("Although apparently straightforward, as with much of BAPCPA, the text Congress used plausibly lends itself to at least two

different interpretations of what exactly 'applicable commitment period' means.").

Neither interpretation fits neatly into the structure of 11 U.S.C. § 1325(b) and simultaneously complies with the overarching purpose of BAPCPA. Frederickson argues that the "applicable commitment period" is not a temporal requirement if the debtor has no "disposable income" as calculated on Form 22C, even if the debtor has disposable income as calculated on Schedules I and J. The resulting outcome of this interpretation is that an above-median debtor who has more actual income than actual expenses, after taking into consideration payment to secured creditors, can have his proposed plan approved without making any payments to unsecured creditors and can close out his plan in a matter of months rather than staying in the system for the full "applicable commitment period" of sixty months.[3] This result does not comport with the clear congressional intent of BAPCPA, which was enacted "'to ensure that debtors repay creditors the maximum they can afford.'" *See In re Gonzalez*, 388 B.R. 292, 309 (Bank. S.D. Tex. 2008) (quoting H.R. Rep. No. 109-31, pt. 1, at 2 (2005), U.S. Code Cong. & Admin. News 2005, pp. 88, 89); *see also In re Hardacre*, 338 B.R. 718, 725 (Bankr. N.D. Tex. 2006) ("The means test was intended to 'ensure that those who can afford to repay some portion of their unsecured debts [be] required to do so." (alteration in

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[3] At oral argument, counsel for the trustee indicated that she had already seen one Chapter 13 case close out after seven months under the bankruptcy court's holding in this case.

original) (quoting 151 Cong. Rec. S2470 (March 10, 2005)); Henry E. Hildebrand, III, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 Am. Bankr. L.J. 373, 373, 396 n.3 (2005) (noting that BAPCPA represented a shift in public policy from making "bankruptcy a more effective remedy for the unfortunate consumer debtor," to "restoring personal responsibility and integrity to the bankruptcy system" (internal quotations omitted)).

The trustee argues that "applicable commitment period" in subsection (b)(1)(B) is a temporal requirement because in subsection (b)(4) that phrase is defined in durational terms rather than as a minimum payment requirement. This interpretation is congruous with the overall structure of the section when the debtor's Form 22C calculation results in a positive disposable income. But when the debtor's disposable income is zero or a negative amount, we must either ignore Congress's definition of "disposable income," which the statute indicates "shall" be applied for above-median debtors, or we must read a temporal requirement into the language of 11 U.S.C. § 1325(b)(1)(B) by disallowing the confirmation of a proposed plan even though "the debtor's projected disposable income" to be received in the "applicable commitment period," *i.e.*, $ 0, is paid to the debtor's unsecured creditors under the plan. Such an interpretation leads to anomalous results because a debtor's proposed plan to pay $ 1 each month for sixty months could be approved, while a plan that proposed to pay $ 1000

per month for fifty-nine months could not be approved.[4] *See In re Nance*, 371 B.R. 358, 371-72 (Bankr. S.D. Ill. 2007) (acknowledging that anomalies result from requiring a sixty-month plan period for an above-median debtor who has negative disposable income). This result, like the outcome of the debtor's interpretation of the statute, ultimately does not achieve the congressional intent of requiring above-median debtors to pay their unsecured creditors the maximum they can afford in every case, because a debtor could propose a plan to pay $ 1 per month despite the fact that he can actually afford a larger payment.

In resolving this issue, we look to Congress's intent that under BAPCPA increased payments will flow from above-median debtors to their unsecured creditors. Accordingly, we must determine not only the meaning of the phrase "applicable commitment period," but also the phrase "projected disposable income."[5]

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[4] Assuming, of course, that the plan met all other requirements, such as good faith. *See* 11 U.S.C. § 1325(a); *Laroy Davis*, 392 B.R. at 134-35, 2008 Bankr. LEXIS 2393 (discussing confirmation requirements in 11 U.S.C. § 1322 and the nine confirmation provisions in 11 U.S.C. § 1325(a)).

[5] We acknowledge that the trustee in this case has conceded that because Frederickson does not have any "disposable income" as defined in 11 U.S.C. § 1325(b)(2), he does not have a minimum payment requirement under 11 U.S.C. § 1325(b)(1)(B). Appellant's Br. at 9. This concession assumes that the definition of "projected disposable income" is the same as the definition of "disposable income." Because we conclude otherwise, we must consider the proper interpretation of "projected disposable income."

In enacting BAPCPA, Congress reduced the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses. Richard S. Stolker, *Debtor's Perspective: BAPCPA Issues*, 40 Md. B.J. 22, May/June 2007, at 23. In determining a debtor's projected disposable income pre-BAPCPA, the bankruptcy court calculated a debtor's disposable income based on Schedules I and J and then multiplied that number by the number of months in the plan. *Laroy Davis*, 392 B.R. at 136, 2008 Bankr. LEXIS 2393; *In re Kolb*, 366 B.R. 802, 808-09 (Bankr. S.D. Ohio 2007) (discussing the pre-BAPCPA calculation of "disposable income" and "projected disposable income"). This process remains the same post-BAPCPA for below-median debtors. *Kolb*, 366 B.R. at 809-12. But for above-median debtors, Congress wanted to eliminate what it perceived as widespread abuse of the system by curtailing the bankruptcy courts' discretion and requiring debtors to pay more to their unsecured creditors. *See id.* at 812 (noting Congress's intent to reduce judicial discretion over the calculation of an above-median debtor's expenses). Accordingly, Congress rigidly defined "disposable income" in 11 U.S.C. § 1325(b)(2). At the same time, however, Congress did not define "projected disposable income" as used in 11 U.S.C. § 1325(b)(1)(B).

As a result, the proper calculation for "projected disposable income" is not clear. We could postulate that a debtor who had $ 727 in disposable income each month in the six months prior to filing for bankruptcy, as calculated on Form 22C, will have $ 727 each month in disposable income in the future.

Then, using the same method that was used pre-BAPCPA, we would simply multiply the debtor's "disposable income" by the number of months in the applicable commitment period to determine how much "projected disposable income" the debtor will likely receive in that period of time. Such a calculation works if the debtor has a positive "disposable income." If the debtor's "disposable income" is negative, however, despite the fact that the debtor could afford to make payments to his unsecured creditors, it is necessary to determine whether the "applicable commitment period" is a temporal requirement or a monetary requirement.

This problem arises because "disposable income" is based upon a debtor's historical income and IRS tables that provide regional averages for common expenses. This calculation may lead to an accurate projection of a debtor's "projected disposable income," but it is not necessarily an accurate projection for many Chapter 13 debtors. The historical calculation does not take into consideration a debtor's current financial situation, which may have changed substantially between the point in time six months before filing bankruptcy and the point in time when the debtor's Chapter 13 plan is being proposed. These changes could be the result of, inter alia, a promotion at work, the loss of a job, the acquiring of a second job, or increased medical expenses. *See, e.g., In re Hanks*, 362 B.R. 494, 496 (Bankr. Utah 2007) (debtor lost his job prepetition and was unable to obtain comparably paying employment); *In re Grady*, 343 B.R. 747, 750 (Bankr. N.D. Ga. 2006) (debtor's heart condition prevented her from working and thus reduced her actual

monthly income). Furthermore, the debtor's actual expenses may be far less than the regional averages that are assumed in the "disposable income" calculation. As a result, a debtor's "disposable income," as calculated on Form 22C, is not the same as the debtor's actual "projected disposable income." *See Kolb*, 366 B.R. at 804-05 (BAPCPA's definition for a debtor's "disposable income" does not reflect a debtor's present actual income or actual expenses).

Thus, a distinction can be drawn between a debtor's "disposable income," which is calculated solely on the basis of historical numbers and regional averages, and a debtor's "projected disposable income," which necessarily contemplates a forward-looking number. Under this interpretation, bankruptcy courts will continue to have some discretion over the calculations of each individual debtor's financial situation, with the result that the debtor's "projected disposable income" will end up more closely aligning with reality. This interpretation also comports with the congressional intent that above-median debtors pay the maximum they can afford and results in making workable the application of 11 U.S.C. § 1325(b)(1)(B) for above-median debtors who have positive "disposable income," as well as for above-median debtors with negative "disposable income." If we read the word "projected" out of 11 U.S.C. § 1325(b)(1)(B) and rely solely on the calculation of "disposable income" on Form 22C, the outcome involves anomalous, and perhaps even absurd, results. *See Gonzalez*, 388 B.R. at 304-05, 308-09 (rigid adherence to a debtor's historical income would produce results inconsistent with the congressional purpose of BAPCPA and

inconsistent with common sense); *see also Hardacre*, 338 B.R. at 723 (Congress must have intended "disposable income" to be something different than "projected disposable income" or it would have used the same language in both places in the statute). While some debtors who could actually afford to pay off some or all of their unsecured creditors would be able to close out their Chapter 13 plan without doing so, other debtors who had more disposable income in the past than what they are likely to receive in the future would be forced to confirm a plan that they could not maintain.

Accordingly, we adopt the view shared by many bankruptcy courts that a debtor's "disposable income" calculation on Form 22C is a starting point for determining the debtor's "projected disposable income," but that the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules I and J. *See In re Kibbe*, 361 B.R. 302, 314-15 (B.A.P. 1st Cir. 2007) (per curiam) (Form 22C is the starting point for determination of "projected disposable income," but if material changes have occurred, bankruptcy court can look at other information to make fact-based determination of debtor's projected disposable income); *In re Lanning*, 380 B.R. 17, 24-25 (B.A.P. 10th Cir. 2007) (same); *Slusher*, 359 B.R. at 299-300 (holding that a debtor's "disposable income" as calculated under 11 U.S.C. § 1325(b)(2) is not the same as a debtor's "projected disposable income," but that it can be used as the presumptive "projected disposable income"); *In re Pak*, 357 B.R. 549, 552 (Bank. N.D. Cal. 2006) (to

determine a debtor's "projected disposable income," the court should try to predict the disposable income that the debtor will receive during the plan using the definition of "current monthly income" in 11 U.S.C. § 101(10A)); *In re Casey*, 356 B.R. 519, 527-28 (Bankr. E.D. Wash. 2006) (court looked beyond Form 22C to determine debtor's projected disposable income and held that the "applicable commitment period" is a temporal requirement); *In re Fuller*, 346 B.R. 472, 485 (Bankr. S.D. Ill. 2006) (for above-median debtors, "projected disposable income" equals income calculation from Schedule I minus standardized expenses from Form 22C); *Grady*, 343 B.R. 747, 752-53 (calculating "projected disposable income" from Schedules I and J due to debtor's heart condition and inability to work); *In re Jass*, 340 B.R. 411, 418-19 (Bankr. Utah 2006) (Form 22C is presumed to be the debtor's "projected disposable income" unless the debtor can show there has been a substantial change in circumstances, in which case the court can look to Schedules I and J); *Hardacre*, 338 B.R. at 722-23 ("projected disposable income" must be based on anticipated income rather than merely an average of past income).

This approach realistically determines how much a debtor can afford to pay his creditors and maximizes the amount the debtor must pay to his unsecured creditors. As aptly noted by the *Kibbe* court, "the object is not to select the right form, but to reach a reality-based determination of a debtor's capabilities to repay creditors." *Kibbe*, 361 B.R. at 315. Additionally, under this interpretation, the "applicable commitment period" is logically a temporal requirement that does not lead to

anomalous or absurd results.[6] *See Nance*, 371 B.R. at 370 (citing H.R. Rep. No. 109-31, pt. I (2005), as reprinted in 2005 U.S.C.C.A.N. p. 88, 146, for the proposition that Congress intended the "applicable commitment period" to provide a certain duration length to Chapter 13 plans and noting that there is no evidence that Congress intended to change the minimum plan length requirement in the pre-BAPCPA version of 11 U.S.C. § 1325(b)(1)(B)); *Slusher*, 359 B.R. at 301 (defining the terms "applicable," "commitment," and "period," and concluding that the phrase "applicable commitment period" indicates a minimum plan length); *Casey*, 356 B.R. at 527-28 (applying the "applicable commitment period" as a temporal requirement); *In re Schanuth*, 342 B.R. 601, 606-08 (Bankr. W.D. Mo. 2006) ("applicable commitment period" is a temporal requirement which must be satisfied unless the plan provides for payment in full of all allowed unsecured claims). Thus, we conclude that the bankruptcy court erred by confirming Frederickson's plan because Frederickson actually does have projected disposable income and therefore the plan cannot be confirmed over the trustee's objection unless it extends for the entire sixty-month applicable commitment period.

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[6] We note, of course, that the "applicable commitment period" in 11 U.S.C. § 1325(b)(1)(B) becomes relevant only after a trustee objects to the debtor's proposed plan. Additionally, because it is not before us, our holding does not address the situation in which a debtor has no actual "projected disposable income" after taking into consideration Form 22C, Schedules I and J, and any change to the debtor's financial circumstances.

In arriving at our holding, we have given careful consideration to the Ninth Circuit's recent decision in *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008), which found persuasive the Eighth Circuit Bankruptcy Appellate Panel's decision in this case. With all due respect to the Ninth Circuit's opinion, we believe that the approach we have taken will more fully accomplish that which Congress intended to achieve through the enactment of BAPCPA.[7]

The judgments of the bankruptcy court and bankruptcy appellate panel are reversed and the case is remanded to the bankruptcy court for further proceedings in accordance with the views expressed in this opinion.

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[7] Whether BAPCPA has accomplished all that it was designed to achieve is a matter of sharp debate. *See* Mike Meyers, "*A Bankrupt System?*," Mpls. Star Tribune, Oct. 12, 2008, at D1.

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT

No. 07-6025EA

In re: Craig Matthew Frederickson, Debtor.

David D. Coop,
Trustee - Appellant.

v.

Craig Matthew Frederickson,
Debtor - Appellee.

Appeal from the United States Bankruptcy Court for the Eastern District of Arkansas

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Submitted: August 15, 2007
Filed: September 24, 2007

Before KRESSEL, Chief Judge, FEDERMAN, and MAHONEY, Bankruptcy Judges.

MAHONEY , Bankruptcy Judge.

This appeal was filed by the Chapter 13 trustee from an order of the bankruptcy court[1]

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[1] Richard D. Taylor, United States Bankruptcy Judge for the Eastern District of Arkansas.

overruling the trustee's objection to confirmation of the debtor's plan of reorganization. It concerns the interpretation of the phrases "projected disposable income" and "applicable commitment period" in 11 U.S.C. § 1325(b)(1)(B) as it was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The question before us is whether, to obtain confirmation of a Chapter 13 plan, an "above-median debtor" whose disposable income is negative when calculated per the statutory requirements must propose a plan that runs five years? The bankruptcy judge confirmed a 48-month plan. For the reasons stated below, we affirm.

I. Standard of Review

The findings of fact are uncontested and no review thereof is sought by the parties. The bankruptcy court's statutory interpretation is a conclusion of law, which is reviewed de novo. *Colsen* v. *United States (In re Colsen)*, 446 F.3d 836, 839 (8th Cir. 2006); *Banks* v. *Griffin (In re Griffin)*, 352 B.R. 475, (B.A.P. 8th Cir. 2006).

II. Background and Discussion

The essence of Chapter 13 is a debtor's ability to repay, through a confirmed plan, at least some of his or her debts over time. In the pre-BAPCPA world, the "disposable income" used for plan payments was initially calculated by subtracting "reasonable" expenses reported on Schedule J from the income reported on Schedule I. If the trustee or a creditor objected, the court would determine the amount that would be allowed as "reasonable" expenses to be used in the calculation. 11 U.S.C.

§ 1325(b)(2) (2004). That "disposable income" was to be used to make plan payments to cover administrative, secured, priority, and general unsecured claims. The BAPCPA amendments modified the definition to state that disposable income "means current monthly income received by the debtor" less reasonably necessary expenditures for the living expenses of the debtor and any dependents, and certain charitable contributions. 11 U.S.C. § 1325(b)(2). "Current monthly income" is a defined term (11 U.S.C. § 101(10A)) which Chapter 13 debtors calculate by using Official Form 22C, the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income. It averages a debtor's income over the six months preceding the bankruptcy filing and uses national and local Internal Revenue Service allowable expense standards. The "disposable income" determined from Form 22C is to be used solely to pay unsecured claims. This method provides an extended view of the debtor's financial history. The pre-BAPCPA method provides a snapshot of the debtor's current financial situation.

The debtor in this case filed his Chapter 13 petition, schedules, Form 22C, and proposed plan on December 13, 2006. Form 22C showed that his annualized income was above the applicable median family income for the state of Arkansas, so he is what is known in modern bankruptcy parlance as an "above-median debtor." The Form 22C also showed that the debtor's monthly expenses exceed his current monthly income by $ 95.49, resulting in negative disposable income. Nevertheless, the debtor proposes to make plan payments of $ 600 per

month. This incongruity arises from the different sources for and function of the figures used in the schedules and on Form 22C. In contrast to the Form 22C numbers, the schedules filed with the petition show a lower average monthly income and much lower average monthly expenses, with the result that the debtor has an actual monthly surplus of $ 600 with which to make plan payments.

In his plan, the debtor proposes to pay $ 600 per month for 48 months. Administrative costs, secured debt, arrearage on long-term debt, and priority tax claims will be paid through the plan, with a pro rata distribution of approximately 75 percent to unsecured creditors. The trustee objected to the duration of the plan, arguing that 11 U.S.C. § 1325(b)(4) requires the term of the plan to be 60 months because this is an above-median debtor.

After a hearing, the bankruptcy court overruled the objection, finding that under the circumstances of this case - the circumstances being the negative disposable income - the Bankruptcy Code does not require the debtor to pay into the plan for five years. The bankruptcy court reasoned that the introductory clause of 11 U.S.C. § 1325(b)(4) says "for purposes of this subsection" the applicable commitment period is either three years or five years, and the "for purposes of this subsection" language can only refer to subsection (b), which addresses what a plan must contain to withstand objection to confirmation. One thing a plan must contain is a provision to apply all of the debtor's projected disposable income to payments to unsecured creditors. However, if there is no projected disposable income, then subsection (b)(4)

and the applicable commitment period do not even come into play. The bankruptcy court quoted *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006), saying "there is no reason to extend plans artificially if there is no requirement that debtors pay a dividend to unsecured creditors over time." *In re Frederickson*, 368 B.R. 825, 831 (Bankr. E.D. Ark. 2007) (quoting *Alexander*, 344 B.R. at 751).

On that basis, the bankruptcy court ruled that an above-median debtor who has no disposable income according to Form 22C can propose a confirmable plan with a length of less than five years if the other statutory requirements are met. 368 B.R. at 831.

The parties in the present case agree that because the disposable income calculated on Form 22C is negative, the debtor is not required to make any payments of "projected disposable income" to unsecured creditors under the plan and the court so found. However, the Trustee takes the position that the disposable income calculation provides a number that is only the minimum amount the debtor must pay to the unsecured creditors. According to the Trustee, because the debtor is "above median," the debtor must stay in the plan for five years and pay into the plan the monthly amount shown as available from deducting "reasonable" expenses as initially shown on Schedule J, or as determined by the court, from the actual income of the debtor on the petition date or the confirmation date. The Trustee points to no statutory authority for such a suggestion, but relies on the assumption that the intent of Congress was to require debtors to pay more to unsecured creditors than was the case prior to the amendments.

To determine if this 48-month plan is confirmable, we must discuss "projected disposable income" and the "applicable commitment period," both of which are referred to in 11 U.S.C. § 1325(b)(1)(B).

Our analysis commences, as always, with the text of the statute. "The starting point in discerning congressional intent is the existing statutory text and not the predecessor statutes." *Lamie* v. *United States Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (citations omitted). "It is well established that 'when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)).

The framework for determining whether a plan may be confirmed is set out in 11 U.S.C. § 1325. If an objection to confirmation is filed, the bankruptcy court must ensure that the elements of § 1325(b)(1) are met. That section provides:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The "applicable commitment period" for payment of projected disposable income to unsecured creditors referred to above is defined as five years for an above-median debtor. 11 U.S.C. §1325(b)(4).

The phrase "projected disposable income" is not a new term. It was in 11 U.S.C. § 1325(b)(1)(B) prior to BAPCPA and was interpreted to mean the disposable income determined by subtracting "reasonable" expenses from Schedule J, or from the determination by the court, from the actual income of the debtor and projected, or applied, over the life of the plan. 11 U.S.C. § 1325(b)(2); *Anderson* v. *Satterlee (In re Anderson)*, 21 F.3d 355 (9th Cir. 1994) (adopting the Fifth Circuit's interpretation in *Commercial Credit Corp.* v. *Killough (In re Killough)*, 900 F.2d 61, 64 (5th Cir. 1990): Calculation of projected disposable income is a two-step process, where the court first multiplies the debtor's monthly income by 36 and then determines how much of that is disposable.); *In re Richardson*, 283 B.R. 783 (Bankr. D. Kan. 2002) (following *Anderson*); *In re Baker*, 194 B.R. 881, 884 (Bankr. S.D. Cal. 1996) ("Projected income is typically calculated by multiplying a debtor's monthly income as of the time of confirmation by the number of months of the plan. The projected income is then compared to those

projected monthly expenses which are 'reasonably necessary to be expended for the maintenance or support of the debtor' to determine the extent to which the projected income is 'disposable.' To the extent the projected income exceeds the reasonable projected expenses it constitutes 'projected disposable income' and must be committed to the plan." (citations omitted)); *In re Mullen*, 369 B.R. 25, 32 n.2 (Bankr. D. Or. 2007) ("Before the BAPCPA effective date, 'projected disposable income' usually was calculated by multiplying the difference between Schedule I income and Schedule J expenses by the estimated length of the Plan, consistent with the requirement of § 1322(a)(1) that the debtor commit 'such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.' Neither the term 'projected disposable income' in § 1325(b)(1)(B) nor the commitment of future income requirement of § 1322(a)(1) was amended by BAPCPA."). While BAPCPA modified the Code definition of "disposable income" to incorporate the new term "current monthly income" as defined elsewhere in the Code, BAPCPA did not redefine "projected disposable income."

However, the lack of a statutory definition of "projected disposable income" has led to varying interpretations as bankruptcy courts across the country struggle to ascertain what the BAPCPA amendments mean. Some courts continue to calculate projected disposable income from Schedules I and J, *see, e.g.*, *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006), some courts calculate it either from Schedules I and J or Form 22C,

whichever more accurately reflects the debtor's anticipated ability to pay creditors, *see, e.g. In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006), and some follow a plain-meaning approach using only the current monthly income figure from Form 22C, *see, e.g., In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006).

The plain-meaning approach was found "to be the most persuasive on the question of how to calculate 'projected disposable income'" by the court in the Southern District of Illinois. *In re Nance*, 371 B.R. 358, 2007 WL 2028579, at *4 (Bankr. S.D. Ill. July 10, 2007). The Illinois bankruptcy court explained:

> This Court, like *Alexander*, finds the placement of the definition of "disposable income" in § 1325(b)(2) indicative of Congress' intent that "current monthly income" be used in calculating "projected disposable income" in § 1325(b)(1)(B). This conclusion is further buttressed by the fact that Congress made no attempt to define "projected disposable income" anywhere in the statute, much less within the same subsection. Had Congress intended for "projected disposable income" to mean something different than "disposable income," it certainly could have provided a separate definition of the term.
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> . . . .

> Furthermore, this Court's interpretation does not render the word "projected" meaningless. Rather the Court finds that "projected" merely explains the treatment of "disposable income." The definition of "projected" is "to plan, figure, or estimate for the future expenditures for the coming year." Webster's Collegiate Dictionary 932 (10th ed. 1996). Thus, under § 1325(b)(1)(B), a debtor's disposable income is calculated, according to the statutory definition, and then projected or extrapolated over the plan's term of years.

2007 WL 2028579, at *4-5. *See also In re Austin*, 372 B.R. 668, 2007 WL 2264062 (Bankr. D. Vt. Aug. 7, 2007) (§ 1325(b)(2), by incorporating current monthly income, relies upon income data from the pre-petition period. "The statute makes no reference to any other income and since 'current monthly income' is a defined term, the Court finds no support for using income from the date of filing or any other time period to compute 'disposable income.'"); *In re Puetz*, 370 B.R. 386 (Bankr. D. Kan. 2007) (Schedules I and J no longer determine plan payments for above-median income debtors; they do not conclusively establish net monthly income even though they may constitute the debtor's best estimates of future income and expenses); *In re Berger*, 376 B.R. 42, 2007 Bankr. LEXIS 2028, 2007 WL 1704403 (Bankr. M.D. Ga. June 11, 2007) (debtors are not obligated to pay more than the disposable income calculated on Form 22C).

The *Berger* case refers to the analogous confirmation requirements for a Chapter 11 individual case and the cross-reference in the statutory language to § 1325(b) when discussing "projected disposable income." BAPCPA added § 1129(a)(15) to Title 11. That section states:

> (a) The court shall confirm a plan only if all the following requirements are met:
>
> . . . .
>
> (15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan -
>
> (A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

The *Berger* court found persuasive Congress's express link of the definition of "projected disposable income" in § 1129(a)(15) to "disposable income" as it is defined in § 1325(b)(2). *See also In re Kolb*, 366

B.R. 802, 816 n.18 (Bankr. S.D. Ohio 2007) (without deciding what weight, if any, § 1129(a)(15) should be given in the context of Chapter 13, the court observed, "§ 1129(a)(15)(B) certainly suggests that 'disposable income' in § 1325(b)(2) and 'projected disposable income' in § 1325(b)(1)(B) were regarded by Congress as the same concept.").

Recognizing the symmetry between the confirmation standards for a Chapter 13 plan and an individual Chapter 11 plan, one commentator has considered the Chapter 13 terms "projected disposable income" and "applicable commitment period" in light of the similar Chapter 11 language at § 1129(a)(15) and concluded that "projected disposable income" is simply annualized disposable income, calculated on Form 22C, and "applicable commitment period," rather than referring to the actual length of a plan, signifies the number of years by which to multiply the annualized disposable income to come to a total sum that the debtor must pay unsecured creditors under the plan. Hon. Randolph J. Haines, *Chapter 11 May Resolve Some Chapter 13 Issues*, 8 Norton Bankr. L. Adviser 1 (Aug. 2007). Under his analysis, a plan therefore need not extend for any particular duration; it need only provide for the payment to unsecured creditors of the dollar amount as calculated above.

The comparative analysis by Judge Haines is consistent with the bankruptcy judge's analysis in this case and consistent with those cited cases using the "plain meaning approach" to statutory interpretation.

Contrary to the position taken by the Trustee, we find that the definition of "applicable commitment

period" in § 1325(b)(4) as five years for an above-median debtor does not refer to a minimum plan duration. It refers, instead, to the time during which the debtor must pay projected disposable income to the Trustee for payment to unsecured creditors. Another statutory provision, § 1322(d), discusses the length of the plan related to above-median income debtors. Section 1322(d) would be superfluous if § 1325(b)(4) set the length of the plan.

After reviewing the statutory language of § 1325(b) and comparing it to § 1322(d) and § 1129(a)(15), we agree that the "plain meaning" approach, as in the cases cited above and the commentary of Judge Haines in the Norton newsletter, is the appropriate method to use when interpreting these statutory provisions. Post-BAPCPA, 11 U.S.C. § 1325(b) is a new creature. While it contains language held over from the old statute, Congress has given it new parameters, with the intention of producing results dramatically different from pre-BAPCPA outcomes. "Projected disposable income" is the disposable income calculated on Form 22C extrapolated over the applicable commitment period. It is the amount to be paid on unsecured claims. The statute requires no more. If the disposable income is negative, there is no applicable commitment period and a debtor is not required to propose a plan that calculates payments to unsecured creditors in the same manner as plan payments to all creditors were calculated pre-BAPCPA.

The applicable commitment period is that period of time an above-median debtor must pay disposable income to the Trustee for payment to the

unsecured creditors. If there is no disposable income, there is no applicable commitment period, and a debtor may obtain confirmation of a plan that is shorter than five years.

III. Conclusion

The order confirming the 48 month Chapter 13 plan is AFFIRMED.

FEDERMAN, Bankruptcy Judge, dissenting

The bankruptcy court discussed and attempted to reconcile two parts of § 1325(b)(2). The first defines disposable income, and provides that all projected disposable income to be received "in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." The second provides that the applicable commitment period, which is 5 years here, may only be reduced "if the plan provides for payment in full of all unsecured claims over a shorter period." The bankruptcy court concluded that the Debtor's projected disposable income over the 5 year period is less than zero, and that the Debtor therefore, in effect, owes nothing to his unsecured creditors under his plan. The plan proposed by the Debtor, and confirmed by the bankruptcy court, requires the Trustee to use payments made by the Debtor to first take care of those obligations which would continue to affect the Debtor after the bankruptcy case is over. Thus, payments to the Trustee are to be used to bring current a nondischargeable student loan, to pay off the loan on

a car Debtor wants to keep, and to pay off nondischargeable tax debt. Once the Debtor takes care of the bills that would otherwise have remained enforceable after the Chapter 13 discharge was entered, the bankruptcy court reasons, he is free to wipe the slate clean on his unsecured debts, even though they have not been paid 100%, and even though he has not made payments for the applicable payment period of 5 years.[2] 2 The provision requiring the Debtor to make payments for an applicable commitment period is, under this interpretation, deemed not to be applicable. Since I conclude that this holding ignores the manner in which the Bankruptcy Code requires payments to be made in Chapter 13 cases, the intent of Congress in amending § 1325(b) and, most importantly, the language of that provision, I respectfully dissent.

The Debtor here proposes a monthly payment of $ 600 to the Trustee, to be distributed pursuant to the provisions of the confirmed plan. The majority opinion analyzes the split in the bankruptcy courts on the question of whether a debtor's projected disposable income is simply based on a mathematical calculation taken from documents filed at the outset of a case, or is subject to some adjustment within the discretion of the bankruptcy court. While an important question, it is not determinative here, since the Trustee does not contend that the Debtor's

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[2] I note that the plan does provide for payment of some of the Debtor's unsecured debt. However, it does not provide for payment of all of it. Under the bankruptcy court's analysis, debtors such as this one would be free to propose a plan under which the unsecured debt would be paid nothing at all.

proposed payment is less than his disposable income. The issue, instead, is how many months the Debtor needs to propose that he make such payment to the Trustee.

In a typical pre-BAPCPA case, little or none of a debtor's monthly payment to the trustee would end up being paid out to unsecured creditors. That is because the Bankruptcy Code gives first call on that payment to secured creditors, and to creditors whose claims are given priority status. In figuring out what his monthly payment needs to be under a plan, a debtor therefore would begin with the monthly payments needed to be made to those secured and priority creditors. Many of those payments would extend throughout the life of the plan. But others, either because of legal requirements or the debtor's own wishes, might be paid off sooner. For example, if another person has co-signed a debtor's obligation, the debtor is allowed to direct the trustee to make payments to that creditor so as to get the co-signer off the hook.[3] If the debtor proposes that that creditor be paid off prior to the conclusion of the case, then the portion of the monthly payment which had been going to that creditor thereafter becomes available to unsecured creditors without priority. Or, in a more common example, the Bankruptcy Code provides for payment in full of priority claims such as attorneys' fees,[4] but does not provide that those payments be spread out over the entire length of the plan. Thus, many courts allow the debtor's

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[3] 11 U.S.C. § 1322(b)(1).

[4] 11 U.S.C. § 1322(a)(2).

attorney's fees to be paid on a monthly basis out of plan payments, over a shorter period than the plan length. Again, once those payments are completed, there should be additional funds available to drop down to unsecured creditors from each monthly payment. Other examples of periodic payments by a trustee which might be made at the beginning, but not throughout a case, include arrearages on long-term debts (which must be cured "within a reasonable time"),[5] arrearages on leases and executory contracts (which must be cured "promptly"),[6] and repayment of loans from certain pension and profit-sharing plans.[7] Before BAPCPA, once a debtor with no projected disposable income had paid or brought current his secured and priority debts, and stayed in the case for 36 months, he was entitled to a discharge even if nothing had been paid to unsecured creditors.

BAPCPA was intended by Congress to require that higher income debtors either pay 100% of unsecured claims, or make payments for a period of 5 years. While there is scant legislative history for most of the BAPCPA provisions, the House Report on § 1325(b) makes clear that the applicable commitment period is a durational requirement for the Chapter 13 plan, and not just, as the majority holds, a multiplier:

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[5] 11 U.S.C. § 1322(b)(5).

[6] 11 U.S.C. §§ 1322(b)(7) and 365(b)(1)(A).

[7] 11 U.S.C. § 1322(f).

> Sec. 318. Chapter 13 Plans to Have a 5-Year Duration in Certain Cases.
>
> Paragraph (1) of section 318 of the Act amends Bankruptcy Code sections 1322(d) and 1325(b) to specify that a chapter 13 plan may not provide payments over a period that is not less than five years if the current monthly income of the debtor and the debtor's spouse combined exceeds certain monetary thresholds. If the current monthly income of the debtor and the debtor's spouse fall below those thresholds, then the duration of the plan may not be longer than three years, unless the court, for cause approves a longer period of up to five years. The applicable commitment period may be less if the plan provides for payment in full of all allowed unsecured claims over a shorter period. . . .[8]

The majority concludes, however, that even though the Debtor proposes not to pay his unsecured claims in full, he is free to obtain a discharge of such debts after just 48 months of payments. In so ruling, the majority ignores the portion of the statute which provides that the applicable commitment period may only be reduced "if the plan provides for payment in

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[8] H.R. Rep. 109-31(1), p. 79, 109th Cong. 1st Sess. 2005 (emphasis added).

full of all allowed unsecured claims over a shorter period."[9]

In addition, prior to BAPCPA, § 1325(b)(1)(B) provided that a debtor's projected disposable income to be received in the three-year period must be applied "to make payments under the plan." Thus, that projected disposable income could be used, as was commonly done, to make payments to priority and secured creditors, leaving nothing for the unsecured creditors at the end of the 36-month plan. Now, however, the statute provides that "all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments *to unsecured creditors* under the plan."[10] In thus amending § 325(b), Congress intended to make more funds available to unsecured creditors. Yet the bankruptcy court's interpretation would allow this Debtor and others to stop making payments as soon as the obligations they would like to see paid have been satisfied, even though they have not made payments for the applicable commitment period required by that section.

The Trustee argues that the projected disposable income requirement sets a minimum amount which a debtor must propose to pay to unsecured creditors, but that a debtor is not free to walk away from those obligations as soon as that

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[9] 11 U.S.C. 1325(b)(4)(B).

[10] 11 U.S.C. § 1325(b)(1)(B).

minimum has been reached. Such an interpretation is consistent with the structure of Chapter 13. Even before BAPCPA was enacted, a debtor was required to propose payments to unsecured creditors at least equal to what those creditors would have received from the debtor's assets in a Chapter 7 liquidation.[11] But proposing to pay that amount has never meant that a debtor has fulfilled all his obligations to those unsecured creditors. Instead, it is simply one of the requirements that must be met in order to confirm a plan. I agree with the Trustee that the projected disposable income test, as revised by BAPCPA, was intended to impose another minimum requirement for confirmation. However, in addition to that minimum, Congress was careful to require that additional protections be given to unsecured creditors. One such protection is that debtors are required to stay in the case and make payments for the applicable commitment period so that, once payments are used by the trustee to satisfy priority and secured claims, payments for the rest of the five years can be paid by the trustee to unsecured creditors. In other words, if a debtor, such as this one, needs to pay, and is able to pay, $ 600 to secured and priority creditors at the beginning of the case, for whatever reason, he should be obligated to propose that payments in that amount continue throughout the applicable commitment period, unless he proposes to pay 100% of his unsecured claims in a shorter period. Since the bankruptcy court's interpretation allows debtors to ignore both

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[11] 11 U.S.C. § 1325(a)(4).

the language of the statute, and its purpose as demonstrated by the legislative history, I would reverse.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

IN RE: Craig M. Frederickson, Debtor

No. 4:06-bk-15737, Ch. 13

May 16, 2007, Decided

MEMORANDUM OPINION AND ORDER

Before the Court is the trustee's Objection to Confirmation of Initial Plan filed on January 19, 2007. The debtor, Craig M. Frederickson, filed his chapter 13 voluntary petition and proposed plan on December 13, 2006. In his plan, the debtor proposed to pay $ 600.00 per month for a period of 48 months, with the unsecured creditors receiving a pro rata distribution. Because the debtor's income is above the median family income for the state of Arkansas, the trustee objected to the 48 month period, arguing instead that the plan must provide for payments over a 60 month time period. The Court heard the trustee's objection on February 21, 2007, and took the matter under advisement to allow the parties additional time to brief the issues. For the reasons stated below, the Court overrules the trustee's objection.

Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(L). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

Background

The facts in this case are undisputed and have been stipulated by both parties:

A. This case was filed on December 13, 2006. The plan, schedules and Statement of Current Monthly Income and Disposable Income (Form 22C) were timely filed on that date.

B. Pursuant to the calculations reflected on the Form 22C, the debtor is an "above-median" debtor whose disposable income is determined pursuant to 11 U.S.C. § 1325(b)(3). The disposable income calculation reflected on Form 22C, line 58 is a negative amount, $ -95.49.

C. The plan provides that the debtor will pay $ 600. per month for a period of 48 months, with unsecured creditors to receive a pro rata dividend. As of the date of the first meeting of creditors, it was anticipated that the unsecured creditors would receive a dividend of $ 3,672.82, or 61% of the scheduled claims. As of

> Tuesday, February 20, 2007, based upon the claims in the case, the trustee calculates that the unsecured creditors will receive $ 5,455.11. If the debtors are required to maintain their case for 60 months, it is estimated that the unsecured creditors' dividend would near, if not equal, 100% on their claims.

Additionally, the parties stipulated to the following exhibits:

A. Narrative Statement of Plan, filed December 13, 2006.

B. Official Form 22C, Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, filed December 13, 2006.

C. Schedules I, J, filed December 13, 2006.

D. Trustee's "payees" print-out reflecting scheduled and filed claims.

The trustee's principle objection is that because the debtor is above the median family income for the state of Arkansas, he must provide for payments over a 60 month period of time in accordance with 11 U.S.C. § 1325(b). The debtor argues that the required 60 month applicable commitment period should not apply in his case because he has no projected disposable income according to Form 22C (sometimes referred to as the chapter 13 means test). According to the debtor, the applicable commitment period is a

multiplier that is used to determine the amount of disposable income that must be paid to unsecured creditors over a period of time. Because he has a negative income according to Form 22C, he should not be required to propose a 60 month plan. The debtor also questions the amount of disposable income that must be committed to unsecured creditors under the plan.

Findings of Fact and Conclusions of Law

According to the bankruptcy code, the court shall confirm a plan if the requirements of 11 U.S.C. § 1325(a) are met. However, if either the trustee or an unsecured creditor objects to confirmation, the court cannot confirm the plan unless the additional requirements under § 1325(b) are also met. According to subsection (b), all of the debtor's projected disposable income that will be received during the applicable commitment period must be applied to make payments to unsecured creditors under the plan. 11 U.S.C. § 1325(b).[1] This

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[1] (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan --

> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(...continued)

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor . . . less amounts reasonably necessary to be expended --

> (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
>
> (ii) for charitable contributions . . . in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than --

> (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
>
> (B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
>
> (C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 525 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period" --

> (A) subject to subparagraph (B), shall be --
>
> (i) 3 years; or
>
> (ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than --

(...continued)

subsection includes two specific requirements for a debtor whose income is above the median family income. First, the debtor's disposable income is determined in accordance with § 707(b)(2), the so-called "means test." Second, the applicable commitment period (in other words, the length of the debtor's plan) shall be not less than five years. Unfortunately, the two requirements, both the result of this debtor having above median family income, in this instance present the Court with a statutory dichotomy. The statutory scheme appears to contemplate only occasions where the debtor, using the means test formula, has a positive projected disposable income that must be committed to the plan over the applicable time period. This is not always the case.

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 525 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

Projected Disposable Income

The debtor's "disposable income," an expressly defined term,[2] is determined by taking his "current monthly income," also a defined term,[3] and subtracting amounts reasonably necessary for the debtor's maintenance and support. According to the debtor's Schedules I and J, the debtor in reality has approximately $ 600.00 of disposable income each month. However, for an above median family income debtor, the amounts reasonably necessary to be expended for his maintenance and support are to be determined in accordance with the means test set forth in § 707(b)(2), using Form 22C. Form 22C determines expenses in accordance with IRS national and local standards. The parties stipulated that the debtor's disposable income according to Form 22C is a negative amount. Even though the debtor has

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[2] "Disposable income" is defined, in relevant part, as

> current monthly income received by the debtor . . . less amounts reasonably necessary to be expended (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and (ii) for charitable contributions . . . in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made. . . .

11 U.S.C. § 1325(b)(2).

[3] "Current monthly income" is defined, in relevant part, as "the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period ending on . . . the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii). . . ." 11 U.S.C. § 101(10A).

proposed a plan that will allow the unsecured creditors to receive a substantial distribution in this case, according to Form 22C the debtor is not required to make any payments to the unsecured creditors under the plan.[4] 4 The trustee concedes this point in his brief.[5]

Although the discrepancy between the disposable income on Schedules I and J and Form 22C appears problematic, the code is clear. Section 1325(b)(3) states that in determining disposable income for a debtor whose current monthly income is greater than the median family income for the state, amounts reasonably necessary to be expended for maintenance and support *shall* be determined by the means test. 11 U.S.C. § 1325(b)(3). The use of "shall" is "mandatory and leaves no discretion with respect to the expenses and deductions that are to be deducted in arriving at disposable income." *In re Barr*, 341 B.R. 181, 185 (Bankr. M.D.N.C. 2006); *see*

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[4] Section 1325(b)(1)(B) used to require that a debtor pay into the plan all of his projected disposable income received during the first three year period to make payments under the plan. The payments would presumably be used to pay the secured claims, the priority claims, and the unsecured claims. This section was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [BAPCPA]. Now, a debtor is required to pay into the plan all of his projected disposable income received during the applicable commitment period to make payments to unsecured creditors under the plan. There is no longer a requirement that the secured claims or priority claims are also to be paid out of the projected disposable income.

[5] The trustee states: "Thus, there is no minimal amount which must be paid to the general unsecured creditors by virtue of the disposable income plan confirmation requirements."

also, In re Kolb, No. 06-32036, 366 B.R. 802, 2007 Bankr. LEXIS 993, 2007 WL 960135 (Bankr. S.D. Ohio Mar. 30, 2007)(stating that use of § 707(b)(2) reflects Congress's intent to provide less discretion in determining expenses for above median family income debtor); *In re Miller*, 361 B.R. 224, 2007 WL 128790 (Bankr. N.D. Ala. 2007)(discussing cases in general and holding Form 22C dispositive for above median income debtor's projected disposable income); *but see In re Ward*, 359 B.R. 741, 2007 WL 63580 (Bankr. W.D. Mo. Jan. 7, 2007)(stating Form 22C means test serves as a starting point in determining projected disposable income); *In re Gress*, 344 B.R. 919 (Bankr. W.D. Mo. 2006)(same). As in the current situation, a debtor whose income is above the median family income may have "excess" income that the debtor is not required to commit to the payment of unsecured creditors. *Barr*, 341 B.R. at 185. However, the language of the statute is clear and the function of the Court is to enforce the statute according to its terms. *Lamie* v. *United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004). There is nothing in the code that suggests any latitude in this interpretation and the Court finds that the debtor has no projected disposable income to commit to the plan for the benefit of unsecured creditors according to Form 22C. Again, the trustee in this instance expressly concedes this point.

Applicable Commitment Period

Temporal Requirement or Monetary Requirement

After determining the monthly amount of disposable income the debtor must commit to the plan, the debtor must satisfy the requirement that

his projected disposable income will be applied for the benefit of unsecured creditors during the applicable commitment period. 11 U.S.C. § 1325(b)(1)(B). Here, the trustee objects specifically to the commitment period proposed by the debtor -- 48 months. According to the trustee, the commitment period set forth in § 1325 (b)(4) is a time or temporal requirement, not a monetary requirement. The debtor argues that because he has no disposable income according to Form 22C, he should not be required to propose a "not less than 5 year" plan as stated in § 1325(b)(4). In effect, the debtor argues that the applicable commitment period of five years is a multiplicand against which his disposable income is multiplied to determine the amount that unsecured creditors shall receive. Because he has no disposable income to be distributed to the unsecured creditors, the debtor believes § 1325(b)(4) is inapplicable in his case.

Much has been written about whether the applicable commitment period is a temporal requirement or a monetary requirement. *See generally In re Luton*, No. 6:06-bk-70629M, 363 B.R. 96, 2007 WL 756373 (Bankr. W.D. Ark. March 8, 2007)(listing in detail courts that find both positions). Courts holding that the period is a temporal requirement focus primarily on the statutory language, which states that the applicable commitment period for an above median income debtor "shall be not less than 5 years." 11 U.S.C. § 1325(b)(4)(A). Further support for this position is found in § 1325(b)(4)(B), which states that the period of time may be less than the applicable commitment period "only if the plan provides for payment in full

of all allowed unsecured claims over a shorter period."

Courts finding that the requirement is a monetary requirement generally agree that the applicable commitment period is part of a formula to determine the amount to be paid to unsecured creditors. Courts should focus "on the amount a debtor will return to creditors rather than the length of time it might take the debtor to perform." *Luton*, 2007 Bankr. LEXIS 717, 2007 WL 756373 at *4 (citing *In re Fuger*, 347 B.R. 94 (Bankr. D. Utah 2006)). The *Fugar* court found that the requirement was both a temporal and a monetary requirement. *Fugar*, 347 at 99. It was temporal in that the debtors had to project their proposed income over a specific period of time and the statute provided a time limit for performing under a plan. Conversely, it was monetary in the sense that it required the debtor to commit to pay unsecured creditors a specific amount. *Id.* The three year period referenced in § 1325(b)(1)(B) before the BAPCPA amendments was the length of time a debtor had to pay his projected disposable income into a plan for the benefit of *all* creditors. If a debtor had no disposable income to pay into the plan, presumably the plan could not be confirmed. *See, e.g., In re Schanuth*, 342 B.R. 601, 604-06 (Bankr. W.D. Mo. 2006)(stating that when a debtor's expenses exceed income, a plan is not feasible and, therefore, not confirmable); *but see In re Alexander*, 344 B.R. 742, 750 n.5 (Bankr. E.D.N.C. 2006)(finding that after BAPCPA, feasibility is no longer dictated by disposable income calculation).

However, this is a BAPCPA case. The applicable commitment period refers to a specific period of time in the statute -- three years or five years -- and the Court finds that when the commitment period applies, it is a temporal requirement, not a monetary requirement as suggested by the debtor. If a debtor has income below the median family income for his state, he must commit his projected disposable income for the benefit of his unsecured creditors for a period of three years. If a debtor has income above the median family income for his state, he must commit his projected disposable income for the benefit of unsecured creditors for not less than five years. This is what is required by § 1325(b)(4). The only way for a debtor to shorten this temporal requirement is "if the plan provides for payment in full of all allowed unsecured claims over a shorter period." 11 U.S.C. § 1325(b)(4)(B).

No Projected Disposable Income

However, a different situation arises when an abov median family income debtor has no projected disposable income according to Form 22C, as in the present case. In this situation, the "applicable commitment period" phrase may not be relevant. *See, e.g., In re Lawson*, 361 B.R. 215, 2007 WL 184733 at *3 (Bankr. D. Utah 2007); *Alexander*, 344 B.R. at 751. The applicable commitment period is the length of time during which the debtor's projected disposable income will be applied to make payments to unsecured creditors under the plan. 11 U.S.C. § 1325(b)(1)(B). However, the subsection that determines the length of the applicable commitment period begins by stating, "[*f*]*or purposes of this*

subsection, ..." The subsection to which the statute is referring is subsection (b), the only section in the code that discusses the applicable commitment period.[6]

Subsection (b) addresses what a plan must include in order for a court to confirm a plan over the objection of the trustee or an unsecured creditor. The requirement is that the debtor provide that all of his projected disposable income received during the applicable commitment period be applied to make payments to the unsecured creditors. The debtor's disposable income is his current monthly income less expenditures as determined by Form 22C. 11 U.S.C. § 1325(b)(2), (3). If the above median family income debtor has no disposable income, then the requirement that he commit that amount monthly, for five years, for the benefit of unsecured creditors reveals the statutory dichotomy. In the absence of any disposable income (as set by Form 22C), the determination of an applicable commitment period (also set by Form 22C) appears to be no longer required. In other words, the applicable commitment period is relevant "for purposes of this subsection" only if the above median family income debtor

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[6] In fact, the only other reference to the applicable commitment period in the code appears in § 1329(c), but, again, only in relation to § 1325(b)(1)(B):

> (c) A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due. . . .

actually has "projected disposable income" to make payments to unsecured creditors under the plan.

Two bases support, and limit, this conclusion. First is the introductory clause to § 1325(b)(4), which states: "*For purposes of this subsection*" -- subsection (b). If, for purposes of subsection (b), the debtor has no disposable income to commit for the benefit of unsecured creditors, it is incongruous to require him to commit that amount -- zero -- for a specific period of time in order to be eligible to propose a confirmable chapter 13 plan. Under pre-BAPCPA law, if the trustee or an unsecured creditor objected to the debtor's proposed plan, the debtor would have had to provide that all of his projected disposable income received in a three year period would be applied to make payments to *all* creditors under the plan -- secured, priority, and unsecured. That is no longer the instance; now, the projected disposable income only needs to be applied to make payments to unsecured creditors under the plan for the applicable commitment period. If the debtor does not have disposable income under § 1325(b)(2), the applicable commitment period referenced in § 1325(b)(1) does not come into play. According to one court, "there is no reason to extend plans artificially if there is no requirement that debtors pay a dividend to unsecured creditors over time. *Alexander*, 344 B.R. at 751. The result is that an above median family income debtor who has no disposable income according to Form 22C can propose a confirmable plan spanning less than five years if the remaining

statutory requirements are met. In this case, the debtor has done just that. [7]

Section 1325(b) is not the only reference to the required length of a debtor's plan that appears in the code. Section 1322(d) states that the plan of an above median family income debtor "may not provide for payments over a period that is longer than 5 years." 11 U.S.C. § 1322(d)(1). This provision establishes a maximum plan length that is the same as the applicable commitment period, but it does not require a minimum commitment period. Alexander, 344 B.R. at 751. If there is no projected disposable income under § 1325(b)(2) for the benefit of unsecured creditors, and, thus, no applicable commitment period under § 1325(b)(4), the debtor should be able to meet the other confirmation requirements under §§ 1322 and 1325 in whatever period of time he may feasibly do so, within the five years allowed by § 1322(d)(1). *Id.*

Second, the term "disposable income" is statutorily defined in the context of a "current monthly income" analysis. Current monthly income is determined historically. Specifically, the debtor is required to determine a figure based on the average of his monthly income from all sources for the six month period prior to his or her filing. Thus, the

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[7] The Court is aware that its finding may actually allow an above median family income debtor to propose a confirmable chapter 13 plan that lasts less than three years. The Court can find no other requirement under the BAPCPA code that requires a minimum plan period of even three years if the debtor has no projected disposable income as determined by Form 22C.

disposable income figure, although a projection, is a finite figure based upon set and definite historical data. Accordingly, and definitionally, the "disposable income" figure does not appear to contemplate increases based on raises, windfalls, or the prospective effect of § 1306.[8] Hence, there appears to be no Congressional purpose designed or served in the circumstance where an above median family income debtor has a negative income and the trustee concedes that the debtor has no obligation to make payments into his plan for the benefit of his unsecured creditors. Additionally, it is apparent from a close reading of § 1325(b)(1) that, in the peculiar and specific facts of this case, the debtor will not have income "received," "applied," or available to "make payments to unsecured creditors" during whatever term is appropriate for the length of his plan.

Conclusion

In this case, the debtor has proposed a 48 month plan that pays a substantial amount to his unsecured creditors, and the trustee objected. Because the debtor is an above median family income debtor, the Court finds that his projected disposable income is determined by Form 22C. The trustee did not object to the debtor's calculations on Form 22C, and the parties have stipulated that the debtor's projected disposable income is a negative number. Additionally, and perhaps appropriately,

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[8] "For purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor. . . ." 11 U.S.C. § 1325(b)(2).

the trustee did not object to the feasability of the debtor's plan or argue that the plan was not proposed in good faith. According to § 1325(b)(1)(B), the debtor is not required to make payments to his unsecured creditors under the plan. Because of this, the Court finds that the applicable commitment period does not apply in the debtor's case. The trustee's objection to confirmation of the debtor's plan is overruled and the debtor's plan is confirmed.

IT IS SO ORDERED.

May 16, 2007

RICHARD D. TAYLOR

UNITED STATES BANKRUPTCY JUDGE

Selected Provisions of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

11 U.S.C. § 101. Definitions.

In this title the following definitions shall apply:

* * *

(10A) The term "current monthly income"--

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic

terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

* * *.

11 U.S.C. § 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if--

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that--

(I) the holder of such claim retain the lien securing such claim until the earlier of--

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if--

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49 [49 USCS § 30102]) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)

(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support

payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

(A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of

the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 575 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period"--

(A) subject to subparagraph (B), shall be--

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than--

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 575 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

11 U.S.C. § 707(b)(2)

* * *

(2) (A) (i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income, reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of--

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $ 6,575, whichever is greater; or

(II) $ 10,950.

(ii) (I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other

provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 [320] of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as

determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $ 1,650 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of--

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or

other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts; divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B) (i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide--

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by

the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of--

(I) 25 percent of the debtor's nonpriority unsecured claims, or $ 6,000, whichever is greater; or

(II) $ 10,000.

* * *

Official Form 22C (Chapter 13) (10/06)

In re Craig Matthew Frederickson
Debtor(s)
Case Number: _____
(if known)

According to the calculations required by this statement:
- ☐ The applicable commitment is 3 years.
- ■ The applicable commitment is 5 years.
- ■ Disposable income is determined under § 1325(b)(3).
- ☐ Disposable income is not determined under § 1325(b)(3).

(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every Individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME			
1.	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. ■ Unmarried. Complete only Column A (the "Debtor's Income") for Lines 2-10. b. ☐ Married. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	Column A Debtor's Income	Column B Spouse's Income
2.	Gross wages, salary, tips, bonuses, overtime, commissions.	$2,858.11	$
3.	Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. Do		

not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.				
	Debtor	Spouse		
a. Gross receipts	$ 0.00			
b. Ordinary and necessary business expenses	$0.00			
c. Business Income	Subtract Line b from Line a		$ 0.00	$
4. Rents and other real property income. Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. Do not include any part of the business expenses entered on Line b as a deduction in Part IV.				
	Debtor	Spouse		
a. Gross receipts	$ 0.00			
b. Ordinary and necessary business expenses	$0.00			
c. Rent and other real property income	Subtract Line b from Line a		$ 0.00	$
5. Interest, dividends, and royalties.			$ 0.00	$
6. Pension and retirement income.			$ 0.00	$
7. Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include amounts paid by the debtor's spouse.			$600.00	$
8. Unemployed compensation. Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:				

Unemployment compensation claimed to be a benefit under the Social Security Act		Debtor $ 0.00	Spouse $	$ 0.00	$
9. **Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism.					
		Debtor		Spouse	
a.		$		$	
b.		$		$	$ 0.00 $
10. **Subtotal**. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).					$3,458.11 $
11. **Total**. If Column B has been completed, add Line 10, column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.					$3,458.11

Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD	
12. Enter the amount from Line 11	$3458.11
13. **Marital Adjustment**. If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you and your dependents. Otherwise, enter zero.	$ 0.00
14. **Subtract Line 13 from Line 12 and enter the result.**	$3,458.11
15. **Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.	$41,497.32

16. **Applicable median family income.** Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: **AR** b. Enter debtor's household size: **2**	$39,463.00

Application of § 1325(b)(4). Check the applicable box and proceed as directed.

- ☐ **The amount on Line 15 is less than the amount on Line 16.** Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and continue with this statement.
- ■ **The amount on Line 15 is not less than the amount on Line 16.** Check the box for "The applicable commitment period is 5 years" at the tope of page 1 of this statement and continue with this statement.

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSAL INCOME	
18. **Enter the amount from Line 11.**	$3,458.11
19. **Marital Adjustment.** If you are married, but are not filing jointly with your spouse, enter the amount of the income listed in Line 10, column B that was NOT paid on a regular basis for the household expenses of you or your dependents. If you are unmarried or married and filing jointly with your spouse, enter zero.	$ 0.00
20. **Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	$3,458.11
21. **Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$41,497.32
22. **Applicable medium family income.** Enter the amount from Line 16.	$39,463.00
23. **Application of § 1325(b)(3).** Check the applicable box and proceed as directed.	
■ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement.	

☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. Do not complete Parts IV, V, or VI.

Part IV. CALCULATION OF DEDUCTION ALLOWED UNDER § 707(b)(2)			
Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)			
24.	**National Standards: food, clothing, household supplies, personal care, and miscellaneous.** Enter the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This infor- mation is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)		$ 825.00
25A.	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)		$ 337.00
25B.	**Local Standards: housing and utilities; non-mortgage/rent expenses.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; non-mortgage/rent expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)		
a.	IRS Housing and Utilities Standards; mortgage/rent Expense	$ 601.00	
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	0.00	
c.	Net mortgage/rental expense	Subtract Line b from Line a	$ 601.00

26. **Local Standards: housing and utilities; adjustment.** If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:	$ 0.00
27. **Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. □ 0 ■ 1 □ 2 or more Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$ 260.00

28.	**Local Standards: transportation ownership/ lease expense; Vehicle 1.** Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. ■ 1 □ 2 or more Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, first Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. Do not enter an amount less than zero.		
a.	IRS Housing and Utilities Standards; mortgage/rent Expense	$ 601.00	
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	$ 400.00	
c.	Net mortgage/rental expense	Subtract Line b from Line a	$ 71.00
29.	**Local Standards: transportation ownership/ lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 28. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. Do not enter an amount less than zero.		

a.	IRS Housing and Utilities Standards; mortgage/rent Expense	$ 0.00	
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	$ 0.00	
c.	Net mortgage/rental expense	Subtract Line b from Line a	$ 0.00
30.	**Other Necessary Expenses; taxes.** Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**		$ 653.42
31.	**Other Necessary Expenses: mandatory payroll deductions.** Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as non-mandatory 401(k) contributions.**		$ 0.00
32.	**Other Necessary Expenses: life insurance.** Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.		$ 0.00
33.	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. **Do not include payments on past due support obligations included in line 49.**		$ 0.00
34.	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available		$ 0.00

35. **Other Necessary Expenses:** Enter the average monthly amount that you actually expend on childcare -- such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**		$ 0.00
36. **Other Necessary Expenses:** Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. **Do not include payments for health insurance listed in Line 39.**		$ 50.00
37. **Other Necessary Expenses:** Enter the average monthly amount that you actually pay for telecommunication services other than your basic home telephone service - such as cell phones, pages, call waiting, caller id, special long distance, or internet service - to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**		$ 85.00
38. **Total Expenses Allowed under IRS Standards.** Enter the total of Lines 24 through 37.		$ 2,882.42
Subpart B: Additional Expense Deductions § 707(b) **Note: Do not include any expenses that you have listed in Lines 24-37**		
39. **Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List and total the average monthly amounts that you actually pay for yourself, your spouse, or your dependents in the following categories.		
a. Health Insurance	$ 77.72	
b. Disability Insurance	$ 7.19	
c. Health Savings Account	$ 0.00	
	Total: Add Lines a, b, and c	$ 84.91
40. **Continued contributions to the care of household or family members.** Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.**		$ 0.00

41.	**Protection against family violence**. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$ 0.00
42.	**Home energy costs.** Enter the average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**	$ 0.00
43.	**Education expenses for dependent children less than 18.** Enter the average monthly expenses that you actually incur, not to exceed $125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. **You must provided your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already account for in the IRS Standards.**	$ 0.00
44.	**Additional food and clothing expense**. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**	$ 29.00
45.	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	$ 0.00
46.	**Total Additional Expense Deductions under § 170(b)**. Enter the total of Lines 39 through 45.	$ 113.91

Subpart C: Deductions for Debt Payment

47. **Future payments on secured claims.** For each of your debts that is secured by an Interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. the Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. Mortgage debts should include payments of taxes and insurance required by the mortgage. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	60-month Average Payment	
a.	**Ford Motor Credit**	**2001 Ford Taurus**	**$400.00**	
			Total: Add Lines	$ 400.00

48. **Other payments on secured claims.** If any debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of of the Cure Amount	
a.	-NONE-			
			Total: Add Lines	$ 0.00

49. **Payments on priority claims.** Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60. $ 126.67

50.	**Chapter 13 administrative expenses.** Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense		
a.	Projected average monthly Chapter 13 plan payment	$ 600.00	
b.	Current multiplier for your district as determine under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$ 5.10	
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b	$ 30.60
51.	**Total Deductions for Debt Payment.** Enter the total of Lines 47 through 50.		$ 557.27
	Subpart D: Total Deductions Allowed under § 707(b)(2)		
52.	**Total of all deductions allowed under § 707(b)(2).** Enter the total of Lines 38, 46, and 51.		$3,553.60

	Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)	
53.	**Total current monthly income.** Enter the amount from Line 20.	$3,458.11
54.	**Support income.** Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	$ 0.00
55.	**Qualified retirement deductions.** Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19)	$ 0.00

56. **Total of all deductions allowed under § 707(b)(2).** Enter the amount from Line 52.	$3,553.60
57. **Total adjustments to determine disposable income.**. Add the amounts on Lines 54, 55, and 56 and enter the result.	$3,553.60
58. **Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 57 from Line 53 and enter the result.	$ -95.49

Part VI. ADDITIONAL EXPENSE CLAIMS

59. **Other Expenses**. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
d.		$
	Total: Add Lines a, b, c and d	

Part VII. VERIFICATION

60. I declare under penalty of perjury that the information provided in this statement is true and correct. (*If this is a joint case, both debtors must sign.*)

Date:_____

Signature:
/s/ Craig Matthew Frederickson
(Debtor)

In re Craig Matthew Frederickson Case No. _____
Debtor(s)

SCHEDULE I. CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by every married debtor, whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. Do not state the name of any minor child.

Debtor's Marital Status: Single	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP(S): Roommate	AGE(S): 29
Employment:	DEBTOR	SPOUSE
Occupation	Operations Manager	
Name of Employer	The Sports Authority	
How long employed	Six months	
Address of Employer	11700 Chenal Pkwy. Little Rock, AR 72211	

INCOME: (Estimate of average or projected monthly income at time case filed)	DEBTOR	SPOUSE
1. Monthly gross wages, salary, and commission (prorate if not paid monthly)	$2,281.00	$ N/A
2. Estimate monthly overtime	$ 100.00	$ N/A
3. SUBTOTAL	$2,381.00	$ N/A
4. LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$ 570.00	$ N/A
b. Insurance	$ 85.00	$ N/A
c. Union dues	$ 0.00	$ N/A
d. Other (Specify:)	$ 0.00	$ N/A
5. SUBTOTAL OF PAYROLL DEDUCTIONS	$ 655.00	$ N/A
6. TOTAL NET MONTHLY TAKE HOME PAY	$1,726.00	$ N/A

7. Regular income from operation of business or profession or farm (Attach detailed statement)	$ 0.00	$ N/A
8. Income from real property	$ 0.00	$ N/A
9. Interest and dividends	$ 0.00	$ N/A
10. Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above	$ 0.00	$ N/A
11. Social security or government assistance Specify: _____	$ 0.00	$ N/A
12. Pension or retirement income	$ 0.00	$ N/A
13. Other monthly income Specify: roommates contribution	$ 600.00	$ N/A
_____	$ 0.00	$ N/A

14. SUBTOTAL OF LINES 7 THROUGH 13	$ 600.00	$ N/A
15. AVERAGE MONTHLY INCOME (Add amounts shown on lines 6 and 14)	$2,326.00	$ N/A
16. COMBINED AVERAGE MONTHLY INCOME: (Combine column totals from line 15; if there is only one debtor repeat total reported on line 15)	$ 2,326.00	

(Report also on Summary of Schedules and, if applicable, on Statistical Summary of Certain Liabilities and Related Data)

17. Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document:

In re Craig Matthew Frederickson Case No. _____

Debtor(s)

SCHEDULE J. CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

Complete this schedule by estimating the average or projected monthly expenses of the debtor and the debtor's family at time case filed. Prorate any payments made bi-weekly, quarterly, semi-annually, or annually to show monthly rate.

☐ Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse."

1. Rent or home mortgage payment (include lot rented for mobile home)	$ 550.00
a. Are real estate taxes included? Yes ___ No X	
b. Is property insurance included? Yes ___ No X	
2. Utilities:	
a. Electricity and heating fuel	$ 0.00
b. Water and sewer	$ 0.00
c. Telephone	$ 85.00
d. Other Cable	$ 40.00
3. Home Maintenance	$ 10.00
4. Food	$ 350.00
5. Clothing	$ 25.00
6. Laundry and dry cleaning	$ 50.00
7. Medical and dental expenses	$ 50.00
8. Transportation (not including car payments	$ 250.00

9. Recreation, clubs and entertainment, newspapers, magazines, etc.	$ 75.00
10. Charitable contributions	$ 0.00
11. Insurance (not deducted from wages or included in home mortgage payments)	
a. Homeowner's or renter's	$ 0.00
b. Life	$ 0.00
c. Health	$ 0.00
d. Auto	$ 150.00
e. Other _____	$ 0.00
12. Taxes (not deducted from wages or included in home mortgage payments)	
Specify: Personal Property taxes	$ 10.00
13. Installment payments: (In chapters 11, 12, and 13 cases, do not list payments to be included in the plan)	
a. Auto	$ 0.00
b. Other _____	$ 0.00
c. Other _____	$ 0.00
d. Other _____	$ 0.00
14. Alimony, maintenance, and support paid to others	$ 0.00
15. Payments for support of additional dependents not living at your home	$ 0.00
16. Regular expenses from operation of business, profession, or farm (attach detailed statement)	$ 0.00
17. Other:	
See Detailed Expense Attachment	$ 75.00

18. AVERAGE MONTHLY EXPENSES (Total lines 1-17. Report also on Summary of Schedules and, if applicable, on the Statistical Summary of Certain Liabilities and Related Data.) $ 1,720.00

19. Describe any increase or decrease in expenditures reasonably anticipated to occur within the year following the filing of this document:

---

20. STATEMENT OF MONTHLY NET INCOME

a. Average monthly income from Line 15 of Schedule I	$2,326.00
b. Average monthly expenses from Line 18 above	$1,720.00
c. Monthly net income (a. minus b.)	$ 606.00

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(2)

No. 08-950

FILED
FEB 27 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CRAIG MATTHEW FREDERICKSON,

Petitioner,

v.

DAVID D. COOP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT

KIMBERLEY F. WOODYARD
Counsel of Record
P.O. Box 5006
North Little Rock, Arkansas 72119
(501) 801-5620

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, in determining the length of time a debtor must maintain his chapter 13 case, the Eighth Circuit Court of Appeals correctly held that the debtor's "disposable income" as defined in section 1325(b)(1)(B) is merely the "starting point" for determining the minimal amount which must be paid to the general unsecured creditors.

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Maney v. Kagenveama, 541 F.3d 868 (9th Cir. 2008) 6

STATUTES AND REGULATIONS:

11 U.S.C. § 707(b)(2) 3

11 U.S.C. § 1325(b) 2, 3

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 539 F.3d 237. The decision of the Bankruptcy Appellate Panel, is reported at 375 B.R. 829. The Order of the bankruptcy court is reported at 368 B.R. 825. Each of these decisions are appended to the petition before this Court.

JURISDICTION

Petitioner invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1), by the filing of his Petition for Writ of Certiorari on January 23, 2009, and that petition was docketed on January 28, 2009. The jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked pursuant to 28 U.S.C. § 158(d), and its decision was entered on October 27, 2008.

STATUTORY PROVISIONS INVOLVED

Section 1325 of the United States Bankruptcy Code is set forth in its entirety in the petition.

STATEMENT OF THE CASE

I. The Statutory Scheme

A. Disposable Income

In contrast to a chapter 7 liquidation case, in a chapter 13 case, the debtor formulates a plan to repay debts. The plan must allocate a sum certain to be paid to the Trustee and apportion those funds to the particular obligations: the mortgage, arrears on the mortgage, other secured debts and any "priority" obligations, usually the taxing authorities. The plan must also address payments to the general unsecured creditors. If the Trustee objects to the plan, the debtor is required to pay all "projected disposable income" into the plan, 11 U.S.C. § 1325(b), for the benefit of the creditors. Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), projected disposable income was initially determined by the simple subtraction of the debtor's reasonable expenses from income. These figures appeared on Schedules I and J, the Official Bankruptcy Forms of the debtor's itemization of current income and expenses, respectively.

Due to perceived abuses in the system, Congress deliberately and specifically reduced the discretion afforded the debtors, courts, and trustees in determining what minimal amount above-median debtors were obliged to pay their creditors. This was effected by altering the method by which disposable income is determined – at least for above-median debtors. In

addition, Congress extended the durational requirement for above-median debtors to five years. Amended section 1325(b) differentiates between debtors whose income level is above the median income level in their state of residence from those debtors whose income is below the median. For debtors whose income is below-median, the method of determining disposable income is still to look to Schedules I and J; the debtor's reasonable expenses are subtracted from their income and, as under pre-BAPCPA law, there is a number which constitutes disposable income and, thus, the appropriate amount of the plan payment.

If the debtor is "above-median," the statute directs the calculator to paragraph (b)(3) which defines "amounts reasonably necessary to be expended," by reference to section 707(b)(2)(A), (B), the chapter 7 "means test." To aid in the calculatory gymnastics required by BAPCPA, Official Form 22C has been developed for chapter 13 debtors. The separate parts aid in calculating monthly income. Many of the calculations are mechanical and based upon figures provided by Internal Revenue Service tables and, in some jurisdictions, policies. There is some room for maneuvering and some discretionary allowances, such as child support payments and charitable contributions, but overall, Congress has provided a budgetary frame-work for determining the minimum amount that above-median debtors are to pay to their general unsecured creditors.

At the conclusion of the Form 22C appears the calculated disposable income. The debtor is obligated to provide in his plan for payment of at least this sum to the general unsecured creditors. *See generally In re Lasowski*, 384 B.R. 205, 213 (BAP 8th Cir. 2008).

B. The Applicable Commitment Period

In addition to the requirement that the debtor pay disposable income, section 1325 requires debtors to maintain their chapter 13 case for a minimal term. Below-median debtors are required to make thirty-six months of plan payments to the Trustee; above-median debtors are required to stay in bankruptcy for sixty months. 11 U.S.C. § 1325(b)(4). The only exception is if the plan provides for a 100% dividend to the creditors.

II. The Facts of *Frederickson*

Craig Frederickson's Form 22C indicated that he was an above-median debtor, but at the conclusion of the form, after the allowed expenses were subtracted, the disposable income figure was a negative. Thus, he had no disposable income dividend requirement payable to the general unsecured creditors. The Trustee did not object to any of the claims of deductions and did not dispute the negative figure. The Trustee objected to the confirmation of the proposed plan, however, because the debtor proposed a plan length of only forty-eight months, not sixty. The Trustee calculated that, although the debtor was not

required to propose a specific amount to be paid to his general unsecured creditors, in light of the plan payment proposed in the plan, by lengthening the plan to sixty months, the general unsecured creditors would receive a 100% dividend.

III. The Arguments and Decisions Below

The parties both asserted that BAPCPA required that the debtor's disposable income be determined as outlined above. The Bankruptcy Court agreed, holding that the terms of the statute controlled such that disposable income was determined solely pursuant to the calculations performed on the Form 22C. The Bankruptcy Court then determined that since the disposable income figure on the Form 22C was negative, there existed no "applicable commitment period" and the debtor could maintain whatever plan length he desired. The Trustee appealed this decision and the Bankruptcy Appellate Panel affirmed in all respects.

The Court of Appeals for the Eighth Circuit, although not presented with any dispute regarding the calculation of disposable income, reversed as to the determination of disposable income, holding that the disposable income figure derived from the Form 22C was merely the "starting point" in determining the calculation of a debtor's "projected disposable income." The Court also reversed the Appellate Panel's decision regarding the applicable commitment

period: an above-median debtor is require to maintain a chapter 13 plan for a period of five years despite the fact that there is no specific disposable income dividend requirement.

RESPONSE TO THE PETITION

The petition presents to the Court the most fundamental and divisive issue in chapter 13 cases following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Determination of a debtor's "disposable income" and "projected disposable income." Three circuit courts of appeal have issued decisions. The Ninth Circuit Court of Appeals, *Maney v. Kagenveama*, 541 F.3d 868 (9th Cir. 2008), applied a strict standard under the statute, while the Eighth and Tenth Circuit Courts of Appeals, *Coop v. Frederickson*, 539 F.3d 237 (8th Cir. 2008); *Hamilton v. Lanning*, 545 F.3d 1269 (10th Cir. 2008), have determined that "projected disposable income" requires a different analysis than under the BAPCPA statutory scheme. Although both the Eighth and Tenth Circuit opinions stray from the statutory scheme, the decisions differ as to what presumption and standards apply under their respective schemes. The Petition has set forth vigorous argument and succinct précis of the case authority for granting the application; respondent does not believe that further exposition would aid the Court, but, rather would merely be duplicative. The issue is critically important

in chapter 13 cases; the issue is recurring and divides the courts at every level.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

KIMBERLEY F. WOODYARD
Staff Attorney to Mark T.
McCarty, successor Trustee
to David D. Coop
P.O. Box 5006
North Little Rock, Arkansas 72119
(501) 801-5620
Kwoodyard@ch13ark.com

February 2009 *Counsel for Respondent*